Supreme Court, U.S.
FILED
FEB 3 - 2005
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No. 04-1060

In The Supreme Court of the United States

MULTNOMAH COUNTY,
DIANE HANSEN and JUDY SWENDSEN,

Petitioners,

v.

ALPHA ENERGY SAVERS, INC.,
an Oregon corporation and ROBERT OBRIST,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the testimony of a public employee that contributes in some way to a judicial or administrative proceeding involving discrimination or government misconduct automatically constitute speech on a matter of public concern, even if the content of the speech would not otherwise constitute protected speech under the First Amendment, or must a federal court conduct a *Connick v. Myers* analysis of the speech before determining that the speech is protected?

2. Does the testimony of a public employee concerning governmental misconduct or discrimination during the course of a judicial or administrative proceeding involving private interests automatically constitute protected speech under the First Amendment or must a federal court conduct a *Connick v. Myers* analysis of the speech before determining that the speech is protected?

3. Does the Ninth Circuit's decision create an automatic inference of reasonable belief on the part of the public employer that the employee has engaged in protected speech in contravention to the *Waters v. Churchill* requirement that a court discern the reasonable belief held by the employer regarding the protected status of the employee's speech based on the record before the court?

4. In a First Amendment claim, is proximity in time between protected speech and allegedly adverse employment actions relevant in analyzing whether the employer's actions were taken in retaliation for the protected speech?

LIST OF ALL PARTIES

Petitioners Multnomah County, Diane Hansen and Judy Swendsen were the defendants in the District Court and the appellees in the Court of Appeals.

Respondents Robert Obrist and Alpha Energy Savers, Inc. were the plaintiffs in the District Court and the appellants in the Court of Appeals.

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OPINIONS BELOW

The federal district court granted the Petitioner's Motion for Summary Judgment on Respondents' 42 U.S.C. §1983 First Amendment claim and on Respondents' pendant state claims. This decision is reproduced in the Appendix as App – 24-50. Regarding the federal claim, the district court found that the evidence did not support Respondents' First Amendment retaliation claim because the evidence showed that Respondents' speech was in the nature of a private grievance rather than of public concern, even though the form of the speech was testimony at a hearing, an affidavit and a witness statement. (App – 44-45).

The Ninth Circuit Court of Appeals reversed the district court decision regarding the individual defendants and remanded for further consideration by the district court on the claims against the County. This decision is reproduced in the Appendix as App – 1-23. The Ninth Circuit held that a public employee's testimony addresses a matter of public concern if it contributes in some way to the resolution of a judicial or administrative proceeding in which discrimination or other significant government misconduct is at issue, even if the speech would not otherwise meet the *Connick*[1] test. (App – 15). The Ninth Circuit further held that the public concern doctrine may be implicated if a witness' testimony directly addresses governmental corruption or discrimination, even if it is offered in the course of a judicial or administrative proceeding that involves only purely private grievances or issues. (App – 15). Finally, in regard to determining retaliatory intent, the Ninth Circuit held that no period of

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[1] *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

time is *per se* too long between protected speech and adverse action by an employer because "there are a variety of reasons why retaliators choose to wait before acting." (App – 18).

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on August 27, 2004. (App – 79). Petitioners were granted an extension of time to file and did file a Petition for Rehearing en banc on September 10, 2004. (App – 51, 79). The Petition for Rehearing was denied and the suggestion for rehearing en banc was rejected on November 5, 2004. (App – 52, 79). Prior to the County's decision to file this Petition, a Writ of Mandate was issued to the District Court by the Court of Appeals; however, the District Court subsequently issued an Order staying proceedings until after a determination is made by this Court. (App – 80-83).

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I, provides, in pertinent part, as follows: "Congress shall make no law . . . abridging the freedom of speech. . . ."

U.S. Const. Amend. XIV, Section 1, provides, in pertinent part, that: "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

An independent contractor, Robert Obrist, started performing services for defendant Multnomah County in the County weatherization program in the early 1990's through his corporation, Alpha Energy, Inc. The County's weatherization program provides weatherization and insulation services to low income County residents through separate, low bid contracts with private contractors. Obrist believes that defendants Hansen and Swendsen, who are County employees working in the weatherization program, disliked him from the beginning of his contractual relationship with the County.

In 1999, Obrist testified at a union hearing involving a former County employee, who worked in the weatherization program. That same year he submitted an affidavit and a witness statement in an age and race discrimination case brought by the same employee. Months before Obrist's testimony at the union hearing, Obrist complained to the County about his contract and the amount of work he was getting.

At the union hearing, Obrist testified that Swendsen and Hansen treated him unfairly and that the former employee's attorney told him that if he testified at the hearing, he could get help with his complaints against the County, Hansen and Swendsen. Otherwise, Obrist only testified about technical details regarding insulation work. The transcript of the union hearing is reproduced in the Appendix at App – 53-72. Obrist's testimony at the union hearing did not concern age or race discrimination. Neither the affidavit nor the witness statement submitted by Obrist in the federal case brought by the same former employee contained any allegations of age or race discrimination. The affidavit and witness statement are reproduced in the Appendix as App – 73-74 and App – 76-78. The former

employee's lawsuit settled and Obrist never testified. There is no evidence in the record that Obrist knew that the former employee's claims concerned age and race discrimination.

The only evidence on summary judgment that any of the defendants knew of Obrist's involvement in the former employee's cases against his union or the County is (1) the fact that defendants Swendsen and Hansen saw Obrist in the hallway outside before the union hearing and knew Obrist was testifying on behalf of the former employee; and (2) the fact that one of Obrist's supervisors allegedly told defendant Swendsen that Obrist was going to testify at the former employee's trial on his claims against the County. Neither Hansen or Swendsen were present at the union hearing when Obrist testified and there is no evidence that any defendant ever learned the contents of that testimony. Similarly, there is no evidence that any of the defendants ever knew the contents of Obrist's affidavit or witness statement.

Plaintiffs received more work in the months following Obrist's testimony at the union hearing in April 1999 than they received in the two years prior to the testimony. Plaintiffs alleged, however, that adverse actions were taken against the plaintiffs after multiple contractors signed individual low bid type contracts in July 2000 under which the County issued work orders. With these types of contracts no one in the County knows during the preparation of these contracts which contractor will wind up submitting the lowest bid entitling the contractor to work orders.

Although Obrist complained to the County about the amount of work he was receiving prior to becoming

involved in the former employee's litigation, and Alpha actually received more work in the months following his union testimony than in the previous two years, the plaintiffs brought this action alleging that the defendants stopped awarding them work in retaliation for his involvement in the former employee's discrimination case against the County.

The district court found that Obrist was concerned about rectifying his difficulties with the County and testified at the hearing because he believed testifying on behalf of the former employee might assist him. The district court concluded that Obrist's speech was in the nature of a private grievance rather than on a matter of public concern and, therefore, his speech could not support a First Amendment retaliation claim.

The Ninth Circuit reversed. The Ninth Circuit ignored Obrist's private grievance and found that a "public employee's testimony addresses a matter of public concern if it contributes in some way to the resolution of a judicial or administrative proceeding in which discrimination or other significant government misconduct is at issue – even if the speech itself would not otherwise meet the *Connick* test were we to consider it in isolation." (App – 15). In so holding, the Ninth Circuit expanded this black letter rule of law for determining speech on matters of public concern to include a witness' testimony that directly addresses governmental corruption or discrimination, even if it is offered during the course of a judicial or administrative proceeding that involves only purely private grievances or issues. (App – 15).

Finally, the Ninth Circuit found that evidence of proximity in time between protected speech and allegedly

adverse actions by an employer are not relevant to a determination of the employer's retaliatory intent. (App – 18).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case extends First Amendment protection to public employee's speech that contributes in some way to the resolution of a judicial or administrative proceeding involving discrimination or some other significant government misconduct, even if the speech itself, based on its content, would not otherwise be protected under previous decisions of this Court. Moreover, the decision extends the First Amendment public concern doctrine to judicial and administrative proceedings that concern only private grievances or issues, if the testimony of the public employee/witness addresses governmental corruption or discrimination.[2]

This decision extends the boundaries of First Amendment protection for public employees established by the Supreme Court in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) and is in conflict with the Supreme Court's method for determining the employer's reasonable belief of protected speech under *Waters v. Churchill*, 511 U.S. 611, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994). In order to determine whether speech is protected, *Connick* requires an analysis of the content,

[2] This Court already extended First Amendment protection to independent government contractors in *Board of County Commissioners, Wabaunsee v. Umbehr*, 518 U.S. 668, 686, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996). References herein to public employees includes public contractors.

context and form of the speech, as revealed by the record as a whole. (461 U.S. at 147-148). The black letter rule of law set forth by the Ninth Circuit in this case disregards the need for that analysis or for a review of the record as a whole; instead it relies solely on context. The Ninth Circuit's holding in this case, as applied to the facts of this case, shows that an employee/witness need only show up, but never testify, at a hearing or even have a third party communicate to the employer that the employee will testify in the future in order to claim First Amendment protection.

The Ninth Circuit's decision erroneously conflates the *Connick* analysis of content, context and form of the speech, as reflected by the whole record, by focusing only on the context of the speech. *Connick* specifically requires an analysis in each case of each element, that is, an analysis of the content, context and the form of speech. (461 U.S. at 154). By applying a black letter rule to certain types of public employee expression, this decision contravenes this Court's direction to district courts to analyze each component before a decision is made regarding whether the speech is protected. Instead, the decision grants automatic protection to speech and expressive conduct, regardless of the content of the speech, pre-existing disputes between the parties, private grievances, the communicative intent of the employee and/or the actual, reasonable belief of the public employer concerning the speech.

Moreover, since the Ninth Circuit found in this case that temporal proximity of allegedly adverse actions to protected speech is irrelevant to a determination of retaliatory intent, employment decisions affecting employees who have testified or been involved in litigation could be

subjected to judicial or juror scrutiny for the foreseeable future. The combination of holdings of the Ninth Circuit in this case, goes too far in protecting public employees' First Amendment rights because it does not take into consideration the public employers' ability to function, not as the government, but as an employer.

1. The Ninth Circuit Decision Ignores the Content, Context and Form Analysis Required by *Connick v. Myers* and Should be Reversed.

The Ninth Circuit decision ignores the clear directive of this Court as set forth in *Connick v. Myers, supra*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). In *Connick*, this Court stated that:

> "whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." (461 U.S. at 147-148).

A district court's task in reviewing a First Amendment case is to apply the *Connick* test to the facts. (*Waters v. Churchill*, 511 U.S. 661, 664-665). It appears that this Court intentionally decided against laying down a general standard by which to judge all allegedly protected speech. (*Connick v. Myers*, 461 U.S. at 154). Rather than laying down a black letter rule for determining when speech is protected, this Court has determined that the inquiry into the protected status of speech is one of law, not fact, which must be determined by the court on a case-by-case basis by applying the content, context, and form analysis. (*Connick v. Myers*, 461 U.S. at 148, 154). Contrary to this directive from this Court, the Ninth Circuit laid down two black

letter rules that give automatic protection to public employees' testimony at certain proceedings regardless of the content of their speech and even if the content of the speech under *Connick* would not be protected. Moreover, the actual knowledge of the speech possessed by the public employer appears to be irrelevant, if the speech falls within the two black letter rules of law laid down by the Court of Appeals.

a. Context

The Ninth Circuit's holding granting automatic First Amendment protection when the speech takes place during certain litigation and the Ninth Circuit's conflating or disregarding of the *Connick* analysis allowed the Ninth Circuit to ignore facts, pertinent under a *Connick* analysis, to determine whether speech is protected.[3] For example, the Ninth Circuit ignored certain facts pertinent to context, including the pre-existing dispute between the plaintiff and the defendants over technical aspects of contract work orders and inspections. The Ninth Circuit also ignored the undisputed fact that the independent contractor's testimony at the union hearing clearly and unambiguously showed that he was testifying so that he could garner support for his pre-existing complaints against the defendants.

District courts applying the black letter rules of law of the Ninth Circuit in this case cannot consider factors

[3] The Ninth Circuit has previously held that even false statements by public employees are protected. *Johnson v. Multnomah County*, 48 F.3d 420, 424 (9th Cir. 1995). This decision does not limit First Amendment protection to truthful testimony. Therefore, theoretically, in the Ninth Circuit even untruthful testimony could be protected.

pertinent to context, e.g., the effect of disputes and personal grievances, like the one between Obrist and the County defendants herein. However, this Court has held that disputes between the parties are relevant to determining whether or not First Amendment rights have been violated. (*Connick v. Myers*, 461 U.S. at 153). In this case, the plaintiffs had contract disputes with the defendants even before Obrist testified at the union hearing. "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case." *Connick v. Myers*, 461 U.S. at 148. In this case, none of the criticisms made by Obrist during his union testimony concerning his own contractual relationship with the County or about the former employee on whose behalf he was testifying rose to the level of constitutional speech. The only context considered by the Ninth Circuit was the former employee's litigation. The contractual dispute plaintiff was having with the County when he testified, and the former employee's attorney's promise to help with that dispute if he testified, were simply ignored by the Ninth Circuit when it applied its new black letter rule of law. The Ninth Circuit's decision is so broad that even where pre-existing and ongoing disputes exist and there is clear evidence that the plaintiff is motivated only by self interest, a public employer will be precluded from obtaining summary judgment in every case where an employee alleges in a complaint that the employee has been involved in some manner in litigation regarding discrimination or some other alleged government misconduct. Summary judgment is precluded even though the content of the speech does not merit constitutional protection.

Summary judgment for a public employer will also be precluded if a public employee alleges in a retaliation claim that he has testified in a private proceeding that the government has done something wrong.

In analyzing the context of the speech in *Connick*, this Court considered the ongoing dispute between the employer and the employee. (461 U.S. at 153). District Courts in the Ninth Circuit are now precluded from doing the same if the case involves testimony or even the promise to testify.

b. Content and Form

The Ninth Circuit's automatic protection of certain speech in effect instructs the district courts to also ignore facts pertinent to content. For example, in this case, the Ninth Circuit ignored the fact that Obrist did not testify, either in person or in a written document, regarding a matter of public concern. Moreover, there is no evidence in the record that Obrist was even aware at the time he testified at the union hearing, or when he filed his affidavit or witness statement, that the former employee's case involved discrimination.

The Ninth Circuit in effect refused to look at the record as a whole, focusing only on the type of proceeding in which Obrist testified and was scheduled to, but did not, testify. The Ninth Circuit relied only on the fact that the former employee's claims concerned race discrimination, even though there is no evidence in the record that Obrist was aware of the nature of his case. The Ninth Circuit in actuality protects Obrist's speech by imputing to Obrist the trial strategy of the former employee's attorney. The attorney wanted to use Obrist's testimony to show

pretext on the part of the County in deciding to terminate the former employee, but there is no evidence in the record that Obrist was aware of this fact. Nowhere in *Connick,* or in any other decision of this Court, has this Court found that a public employee's speech on neutral, technical matters can attain the status of speech on a matter of public concern by imputing the intentions or purpose of another employee, or that employee's attorney, to the employee presently asserting First Amendment protection. While this Court has recognized that a public employer may inadvertently violate a person's First Amendment rights, this Court has never held that a public employee can inadvertently assert First Amendment rights. (*Waters v. Churchill*, 511 U.S. at 669-670). To the contrary, this Court has focused on protecting public employees when they consciously choose to act as citizens speaking out on matters of public concern. *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

By adopting a black letter rule, not only can the Ninth Circuit impute the public concern intentions of a former employee and his attorney to Obrist, it can ignore the fact that, unlike the major decisions of this Court concerning the First Amendment rights of government employees (*Pickering v. Board of Education, supra*; *Connick v. Myers, supra*; *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Waters v. Churchill, supra*), where the employers had actual knowledge of the *contents* of the speech, the defendants herein had no such knowledge concerning the speech or the communicative intent of the speech. With a black letter rule regarding what constitutes protective speech, knowledge of speech can merely be inferred, as the Ninth Circuit, in effect, did in this case.

This Court recently said in *City of San Diego, California v. Roe*, ___ U.S. ___, 125 S. Ct. 521, 160 L. Ed. 2d 410, 2004 U.S. LEXIS 8165 (December 6, 2004), that

> "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at time of publication." (125 S. Ct. at 525).

The Ninth Circuit's automatic protection of public employee's testimony is in contravention of the principles of law laid down by this Court regarding the scope and content of speech on matters of public concern.

2. The Ninth Circuit's Decision in Effect Creates an Inference that the Public Employer Has a Reasonable Belief of Protected Speech Based Only on the Context of the Speech, even if the Employer Has no Knowledge of the Content of the Speech, in Contravention to this Court's Decision in *Waters v. Churchill*.

The Panel's decision is in conflict with *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994). *Waters* stands for the proposition that an employer must conduct an investigation and form a reasonable belief regarding an employee's protected speech before making an employment decision. (511 U.S. at 677-678). The courts will then "look to the facts as the employer reasonably found them to be." (511 U.S. at 677). If the public employer forms a reasonable belief that the employee engaged in protected speech, then the employer must use due care in making any employment decisions. (*Id.*)

In the present case, there are only two points in time when the defendants could have formed a reasonable

belief concerning Obrist's speech, namely, when Hansen and Swendsen saw Obrist in the hallway outside the union grievance hearing room and when Obrist's supervisor told Swendsen that Obrist was going to testify at a federal trial. However, there is no evidence in the record showing that any County defendant had any reason to investigate what Obrist said in his union testimony and Obrist in fact never testified at the federal trial. Therefore, none of the defendants formed a reasonable belief one way or the other concerning the intent or content of Obrist's testimony. The evidence on summary judgment showed that Obrist admitted that he could not have told Hansen and Swendsen what he was going to say when he testified at the union hearing because he himself didn't know what he was going to say.

By applying its black letter rule of law, which only considers context, the Ninth Circuit was able to ignore the fact that the defendants had not formed a reasonable belief regarding Obrist's speech nor did they have any actual knowledge of the speech. The Ninth Circuit in effect imputed a reasonable belief of protected speech to the defendants because defendants Hansen and Swendsen saw Obrist outside the hearing room, even though there is no evidence that they knew anything about the contents of the testimony. Such a conclusion ignores the *Waters* requirement that the employer investigate and form a reasonable belief regarding the protected speech. However, there was no evidence in this case that the employer had any reason to investigate any speech or that the defendants came to any conclusion regarding the speech, either in good faith, as pretext, or unreasonably. (*Waters*, 511 U.S. at 676). In fact, there was no evidence that any

defendant knew the content of any of plaintiff's speech, actual or expressive.

For purposes of summary judgment, the effect of the black letter rules of law laid down by the Ninth Circuit is that a court must infer a reasonable belief on the part of an employer that the employee engaged in protected speech. This result is mandatory if the allegations in the complaint show that the employee participated in the types of litigation now receiving automatic First Amendment protection, regardless of content of the speech, pre-existing disputes or self-interest.

In *Waters*, this Court states that once an *employer* makes a determination that the speech is protected, "the manager must tread with a certain amount of care . . . It should be the care that a reasonable manager would use before making an employment decision – discharge, suspension, reprimand or whatever else – of the sort involved in the particular case." (511 U.S. 677-678). Now public employers in this Circuit will feel bound to "tread with a certain amount of care" in making employment decisions if the employer even hears a rumor that an employee might testify, some time in the future, in a case concerning the government employer or a public employee. Although the evidence in this case showed that none of the managers knew of Obrist's participation in the former employee's cases, public employers will now have to ask themselves if they should request witness lists or ask employees to report participation in litigation, both public and private.

Regardless of whether the employer ever knows the true contents of the speech, or ever forms a reasonable belief of protected speech, reasonable belief will be

inferred by district courts because the Ninth Circuit's decision instructs them to disregard the *Connick* analysis and focus only on the forum in which the speech took place. The Ninth Circuit's decision is so broad that it is even questionable whether it is worthwhile for public employers to conduct an investigation, as described in *Waters*, regarding involvement in lawsuits, or just automatically "tread with due care" before rendering any employment decision involving an employee who may have testified. The impact of the Ninth Circuit's decision on the ability of public employers to fairly promote, demote and discipline its employees, and also avoid litigation of retaliation claims, cannot be underestimated.

In *Waters*, this Court recognized that to be protected, speech must be on a matter of public concern. (511 U.S. at 694). It is a district court's duty to apply the *Connick* test to the allegedly protected speech. *Id.* In analyzing the content, context and form of the speech it is only the speech that is actually known, or actually reasonably believed by the employer to have been said, that are relevant to the inquiry. (511 U.S. at 681). The Ninth Circuit in its decision ignores this directive from this Court by inferring knowledge from Obrist's mere presence outside a hearing room and by relying on a statement by Obrist's supervisor that Obrist was going to, but did not, testify in another proceeding.

This decision should be reviewed by this Court because it can potentially affect the efficiency of public employers in making the multitude of employment decisions that they must make on a daily basis. This decision should also be reviewed by this Court because the black letter rules of law laid down in effect preclude district

courts from deciding whether the speech in question concerns a matter of public concern as a matter of law.

3. Proximity in Time Between Protected Speech and Allegedly Adverse Action Is Relevant to a Determination of Retaliatory Intent.

The contract under which allegedly adverse actions were taken by defendants against plaintiffs went into effect in July 2000, more than seven months after Obrist submitted an affidavit in the federal suit brought by the former employee and more than 15 months after he testified at the union hearing. The Ninth Circuit, however, ignored the fact that the contract about which plaintiffs complain was a low bid type contract that went into effect in July 2000. Since the contract was a low bid contract none of the County employees who participated in the writing of the contract prior to its signing could have known which contractor would be favorably or adversely impacted by the terms of the contract. The Ninth Circuit, however, failed to recognize the fact that the Alpha-County contract was a low bid contract requiring bids to be submitted by multiple contractors. The Ninth Circuit, therefore, concluded that the allegedly adverse actions were taken during the planning stage, which occurred three months after submission of Obrist's affidavit.

According to the Ninth Circuit's reasoning, however, it does not matter if the allegedly adverse action occurred 3 months, 7 months, 15 months or even two years after the allegedly protected speech. The Ninth Circuit found that proximity in time between protected speech and retaliatory actions is irrelevant to the inquiry into retaliatory motive because "there are a variety of reasons why retaliators choose to wait before acting". (App – 18). This denial

of the relevance of proximity in time led the Ninth Circuit to ignore the undisputed fact that the plaintiffs actually experienced an increase in work after Obrist testified at the union hearing, stating, "This temporary increase serves only to illustrate further that the defendants may have strategically postponed their retaliation until after the new contracts, . . . ". (App – 18). In effect, this ruling by the Ninth Circuit means that once an employee participates in some manner, whether as a party or a witness, in any type of adjudicatory proceeding, any action taken by a government employer that the employee deems to be adverse can be subjected to judicial scrutiny, for the foreseeable future.

This Court has not specifically addressed the issue of proximity in time between protected speech and adverse action in a First Amendment case of this kind. However, this Court has addressed this issue in a Title VII context (42 U.S.C. §2000e-3). In *Clark County School District v. Breeden,* 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001), a Title VII case, this Court indicated, and cited with approval circuit court holdings so stating, that temporal proximity between protected speech and adverse actions must be very close, i.e., a three or four month period is insufficient. (532 U.S. at 273-274). This Court should review this issue in the context of a First Amendment claim brought under 42 U.S.C. §1983. If the Ninth Circuit's decision stands, public employers may be subjected to judicial review of their employment decisions affecting employees involved in some type of litigation no matter how removed in time the employment decision is from the employee's allegedly protected speech.

On review, this Court should find that, even if the plaintiff's speech is protected, given the lack of temporal

proximity between the speech and the allegedly adverse actions taken by defendants, there was no showing of retaliatory intent. Therefore, the decision of the Ninth Circuit should be reversed.

4. The Circuits are Split on Questions Concerning First Amendment Protection of Public Employees' Testimony.

As the Ninth Circuit itself points out the circuits are divided concerning the constitutional protection that should be accorded public employees' testimony, whether the employee be a witness or a party. (App – 12). The conflicting opinions are set forth below.

The Second, Third and Fifth circuits, as discussed below, give absolute protection. However, four other circuits (Fourth, Seventh, Eighth and Eleventh) in various manners apply the *Connick v. Myers* analysis to the allegedly protected testimony.[4]

Eight circuits have either decided or discussed the issue of First Amendment protection of public employee testimony with varying results. The decisions range from absolute protection regardless of the truthfulness of the statements to an analysis of the personal motivation of the employee in giving testimony to due consideration being given to the employer's reasonable belief in the truthfulness or the falsity of the statements.

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[4] The Tenth Circuit has not rendered a specific holding regarding this issue, but appears to be in line with the Third, Fifth and Ninth circuits. *Lytle v. City of Haysville,* 138 F.3d 857, 864 n. 2 (10th Cir. 1998).

It is clear that this Court should resolve this conflict between the circuits. This Court should clarify for all appellate courts whether a black letter rule of law giving absolute protection to public employees' testimony should be applied in First Amendment cases or if the *Connick v. Myers* content, context and form analysis should be utilized on a case-by-case basis to determine whether the public employees' testimony constitutes speech on a matter of public concern.

a. Second Circuit
***Konits v. Valley Stream Central High School District*, 2005 U.S. App. LEXIS 260 (2d Cir. N.Y., January 7, 2005)**

Plaintiff alleged that the school district she worked for retaliated against her, in violation of her First Amendment rights, for filing a 1996 lawsuit against the same defendant. The 1996 lawsuit, which settled during trial, alleged retaliation against this plaintiff for her assistance to another employee in her gender discrimination suit. This plaintiff's assistance to the gender discrimination plaintiff consisted of helping her with internal complaints, referral to a lawyer, who was this plaintiff's sister, and being listed as a witness in the gender discrimination lawsuit.

The Second Circuit found that since this plaintiff's 1996 lawsuit was predicated on speech about gender discrimination against a fellow employee, the prior retaliation lawsuit involved speech on a matter of public concern.

b. Third Circuit
***Green v. Philadelphia Housing Authority*, 105 F.3d 882 (3rd Cir. 1997)**

Plaintiff, a police officer, was transferred from a drug task force to regular patrol duties after he voluntarily appeared to testify at a bail hearing on behalf of the son of an alleged organized crime boss. The plaintiff brought a First Amendment retaliation claim, alleging that he was transferred to regular patrol for volunteering to testify at the bail hearing. The Third Circuit found that the plaintiff's voluntary appearance, as a character witness, was protected speech because the context of a courtroom appearance raises speech to the level of public concern, regardless of the content. (105 F.3d at 887).

c. Fourth Circuit
***Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75 (4th Cir. 1988)**

Plaintiff, a police officer, was fired for allegedly lying during an investigation of sex discrimination charges brought against his employer by a co-worker. During a police investigation a year before the lawsuit, plaintiff told investigators that the marijuana found in his van belonged to the co-worker who now alleged sex discrimination. However, during a fair employment hearing concerning the sex discrimination charges, plaintiff stated that he did not know whether the marijuana belonged to the co-worker. The Fourth Circuit reversed the district court's determination that the testimony, given the context, was speech on a matter of public concern. The Fourth Circuit found that statements, as in the case it was reviewing, that involve private interest of any kind and are devoid of

public concern and are not entitled to First Amendment protection. (862 F.2d at 79).

d. Fifth Circuit
***Johnston v. Harris County Flood Control District*, 869 F.2d 1565 (5th Cir. 1989)**

Plaintiff testified at an Equal Employment Opportunity hearing on behalf of another employee. The employer subsequently offered the plaintiff a demotion and when he rejected the demotion offer he was terminated. The Fifth Circuit held that, although the content of the testimony concerned only a personnel dispute, since the testimony was given before an official government adjudicatory or fact-finding body, the plaintiff's speech was a matter of public concern protected by the First Amendment. (869 F.2d at 1577-1578).

e. Seventh Circuit
***Wright v. Illinois Department of Children and Family Services*, 40 F.3d 1492 (7th Cir. 1994)**

Plaintiff, a child protective services worker, alleged, among other things, retaliation by her government employer for testifying adversely to her employer's interests at a hearing concerning child abuse. The Seventh Circuit, following precedents in that circuit, refused to adopt a blanket rule that a public employee who testifies before an official government adjudicatory or fact-finding body speaks in a context that is inherently of public concern. (40 F.3d at 1505). The Seventh Circuit also found that if an employee's testimony is on a matter of public concern, but the employer, after reasonable investigation, believes that the testimony is false, even if actually true, the employer

can discipline the employee.[5] This case however was remanded due to disputed facts.

f. Eighth Circuit
***Padilla v. South Harrison R-II School District*, 181 F.3d 992 (8th Cir. 1999)**

Plaintiff, a teacher, was charged with several crimes involving sexual misconduct with a student. At his trial he testified on cross-examination, over objections, that he believed that it would be appropriate for a person in his position to have a sexual relationship with a minor, if it was outside of school and consensual. After this testimony, the school board did not renew his teaching contract. Plaintiff filed a First Amendment retaliation claim based on the compelled nature of his testimony. The Eighth Circuit found that the speech addressed the plaintiff's private concern, rather than a matter of public concern like school board policies, and therefore did not constitute speech on a matter of public concern. (181 F.3d at 997).

g. Eleventh Circuit
***Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000)**

Plaintiff brought a First Amendment retaliation claim against her supervisors and managers who were employed by the government. She alleged that they had retaliated against her after she testified at her supervisor's grievance hearing. Plaintiff alleged that her testimony did not involve her personal interests, but rather employment

[5] In the Ninth Circuit, under *Johnson v. Multnomah County*, *supra*, an employer may not be able to consider the falsity of the testimony. (40 F.3d at 424).

policies and rights. The Eleventh Circuit stated that an employee's speech will rarely be entirely private or entirely public and, therefore, the main thrust of the employee's speech must be determined. (211 F.3d at 1352). The Eleventh Circuit found that the speech was not protected because the forum in which the testimony was given was not open to the public, the purpose of the plaintiff's speech was not to raise issues of public concern, and by testifying the plaintiff furthered her own self interest. (211 F.3d at 1351-54).

CONCLUSION

The defendants herein do not seek to silence the First Amendment rights of its employees. However, the Ninth Circuit's decision in this case, which ignores the content of the speech, pre-existing disputes and the self-interest of the speaker, contravenes the reasoning and rationale of *Pickering, supra* and *Connick, supra,* which protect a public employee's speech only when the employee speaks out as a citizen on a matter of public concern.

Moreover, given the Ninth Circuit's black letter rules of law concerning protected speech and its ruling on the irrelevance of temporal proximity in determining retaliatory intent, public employers face judicial or juror scrutiny of all employment decisions – promotions, demotions, discipline – involving employees who at one time have been involved in litigation.

For the above stated reasons, defendants respectfully request that this Court grant this Petition and review the Ninth Circuit's decision in this case.

Respectfully submitted,

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ALPHA ENERGY SAVERS, INC., an Oregon corporation; Robert Obrist, Plaintiffs-Appellants, v. DIANE HANSEN; MULTNOMAH COUNTY; JUDY SWENDSEN, Defendants-Appellees.

No. 03-35142.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

381 F.3d 917; 2004 U.S. App. LEXIS 18238; 21 I.E.R. Cas. (BNA) 1185

May 6, 2004, Argued and Submitted, Portland, Oregon
August 27, 2004, Filed

COUNSEL: Daniel J. Snyder, Portland, Oregon, for the plaintiffs-appellants.

Susan M. Dunaway, Portland, Oregon, for the defendants-appellees.

JUDGES: Before: Stephen Reinhardt, Barry G. Silverman, and Richard R. Clifton, Circuit Judges. Opinion by Judge Reinhardt.

OPINION BY: REINHARDT

OPINION:

REINHARDT, Circuit Judge.

This case requires us to consider the scope of constitutional protection afforded to public contractors who serve as witnesses in judicial and administrative proceedings. Robert Obrist testified at a grievance hearing, and filed an affidavit and agreed to be listed as a witness in a federal discrimination lawsuit, on behalf of a former employee of Multnomah County. The County and two of its employees,

Diane Hansen and Judy Swendsen (collectively referred to as "the defendants"), allegedly retaliated against Obrist by manipulating the County's contracting procedures in order to deny work to his company, Alpha Energy Savers, Inc.

The district court granted summary judgment for the defendants on the ground that Obrist's expressive conduct did not touch upon a matter of public concern and, thus, could not support a First Amendment retaliation claim under 42 U.S.C. § 1983. We reverse that ruling against Obrist and Alpha (collectively referred to as "the plaintiffs"). We also reverse the district court's grant of summary judgment on the plaintiffs' supplemental Oregon state law claim of intentional interference with contractual relations.

I. Background

For over ten years, Alpha has contracted with Multnomah County to provide insulation and other energy-saving weatherization services for the homes of low-income residents.[1]

In a series of multi-year agreements with the County, Alpha and other vendors each specified the prices that

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[1] The defendants made a motion to strike portions of the affidavits that the plaintiffs filed in opposition to summary judgment. The following factual summary does not rely upon any of the challenged paragraphs unless the district court explicitly denied the defendants' motion with respect to the information contained therein. Here, as in all summary judgment cases, we view the facts in the light most favorable to the non-moving party and accept its version of any disputed facts. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003).

they would charge (i.e. bid) for various types of weatherization services.[2] When a qualified low-income resident requests assistance, the County weatherization department conducts an audit to determine what specific services are required. Then, the County awards the job to the contractor who submitted the lowest bid for the particular combination of services – unless one of several exceptions applies (e.g. the lowest bidder exceeded its bonding limit or the weatherization department determines that the job is appropriate for the County's welfare-to-work crew).

In April 1999, Curtis Stephens, a former employee of the County weatherization department, subpoenaed Robert Obrist, Alpha's president and sole owner, to testify at a hearing before the Oregon Employment Relations Board. Stephens alleged that his union, Oregon AFSME Council 775, breached its duty of fair representation by failing to investigate and pursue a grievance against the County, which, he alleged, had wrongfully discharged him. The County's stated reason for terminating Stephens was that he falsified weatherization audits. According to Stephens, these charges were fabricated by Judy Swendsen and Diane Hansen, two weatherization department employees who, he contended, were biased against him on account of his age and race. At the time that he was fired, Stephens was the oldest employee and the only black in the County weatherization department.[3]

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[2] One set of vendor contracts ("the 1996 contracts") covered the period between July 1996 and February 2000 and was ultimately extended through June 30, 2000. Another set of contracts went into effect on July 1, 2000 ("the 2000 contracts").

[3] During the relevant time period, Swendsen inspected contractors' work for compliance with program specifications. Hansen's official job

(Continued on following page)

At the grievance hearing, Obrist testified that he had never experienced any problems with the weatherization audits conducted by Stephens, recounted critical comments that Hansen and Swendsen had made about Stephens and his work, and expressed his opinion that Hansen and Swendsen "manipulated" the County weatherization program: "it's either their way or the highway, there's no gray areas." On cross-examination, Obrist complained that Stephens was not the only victim of unfair treatment by Hansen and Swendsen; he testified that the two employees were also responsible for failing to award Alpha weatherization contracts to which it was entitled as the lowest bidder.

In addition to his testimony before the Oregon Employment Relations Board, Obrist also came to Stephens's aid when Stephens filed suit against the County in federal court alleging race and age discrimination. In November 1999, Obrist submitted an affidavit stating that Stephens's "work was as good as [that of] anyone else in the weatherization department," that Swendsen and Hansen were "very biased" toward Stephens, and that they "worked toward the goal of getting [him] out of the weatherization department." Obrist also agreed to testify on Stephens's behalf, and the contents of his affidavit were summarized in the witness statement that Stephens filed in December 1999. Ultimately, however, Obrist was not required to

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responsibilities included: processing residents' applications for weatherization services, sending work orders to contractors, and maintaining files for each job. According to the plaintiffs, Hansen was the de facto manager of the department because Cecile Pitts, the program manager, worked part-time and had little experience with the technicalities of weatherization services.

testify because the County settled with Stephens for "a large sum of money."

In the same period that Obrist was providing assistance to Stephens, he was also pursuing his own claim against the County for unfair treatment. Beginning in February 1999, Obrist complained to various County personnel that Alpha was being denied work to which it was entitled. An investigation conducted by Assistant County Attorney John Thomas determined that the weatherization department had not always awarded jobs to the lowest bidder. Following Thomas's investigation, the weatherization department reformed its bidding procedures, and in February 2000, the County settled with Alpha for $18,800.[4] Alpha experienced a temporary spike in contract awards while the investigation was underway, but its share of the County jobs declined again after the settlement. In addition, Swendsen and other weatherization employees subjected Alpha's work to increasingly rigorous inspections.

Early in 2000, the County began drafting new master weatherization contracts to replace the existing versions that were scheduled to expire. At a weatherization staff meeting, Hansen stated that she intended to "Rob proof" the new contracts – an obvious reference to Robert Obrist. Hansen also confided to another County employee that she was "fixing it" so that Obrist would not receive further work from the County. Hansen and Swendsen helped

[4] As part of the settlement, Alpha released the County and its employees for claims relating to its 1996 master contract. The plaintiffs do not appeal the district court's determination that the settlement limits the defendants' potential liability in the present case to conduct that occurred after February 1, 2000, the date of the release.

revise provisions of the new contracts that increased the County's discretion not to award jobs to contractors that were the lowest bidders.[5] The new contracts were completed in June and put into effect in July, when they were executed by the individual vendors, each of whom signed a separate agreement.

Alpha, like the other vendors, entered into one of the new agreements with the County and was pre-authorized for up to $100,000 in contract awards. However, it received only two of the 1,004 jobs that the County awarded through October 2002. According to other contractors and County personnel, Hansen and Swendsen tampered with files, altered bidding sheets, manipulated the department's computer database, and engaged in other schemes to direct work away from Alpha. Hansen and Swendsen also continued to make negative statements about Alpha, its owner, and its employees. For instance, Hansen called Obrist an "asshole" and the "anti-Christ" and stated on several occasions: "We don't want to give Obrist any jobs that he bid on."

Beginning in July 2000, Obrist expressed concerns about the new master contracts as well as ethical violations, fraudulent practices, favoritism, and mismanagement to Pitts, the department supervisor; Lolenzo Poe, the director of the County Department of Community and Family Services; and the U.S. Department of Energy, which funds the weatherization program. Then in September 2001, Alpha and Obrist filed suit.

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[5] The County insists that Assistant County Attorney Thomas was primarily responsible for the redrafting and that Hansen and Swendsen were only involved in technical aspects. However, Hansen stated in her deposition that she and Swendsen did much of the work.

The district court granted summary judgment for the defendants. The plaintiffs challenge its ruling on their First Amendment retaliation claim and on their state law tort claim of intentional interference with contractual relations, but not on their other supplemental claims.

II. *First Amendment* Retaliation Claim

When a business vendor operates under a contract with a public agency, we analyze its First Amendment retaliation claim under § 1983 using the same basic approach that we would use if the claim had been raised by an employee of the agency. *Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr,* 518 U.S. 668, 684-85, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996). Accordingly, the contractor must establish that (1) it engaged in expressive conduct that addressed a matter of public concern; (2) the government officials took an adverse action against it; and (3) its expressive conduct was a substantial or motivating factor for the adverse action. *Roe v. City of San Diego,* 356 F.3d 1108, 1112 (9th Cir. 2004). If the contractor meets its burden, the government officials (and the government itself) can nonetheless escape liability if they demonstrate either that: (a) under the balancing test established by *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), legitimate administrative interests in promoting efficient service-delivery and avoiding workplace disruption outweigh the contractor's free speech interests; or (b) under the mixed motives analysis established by *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), they would have taken the same actions in the absence of the contractor's expressive conduct. *Umbehr,* 518 U.S. at 675-76; *Roe,* 356 F.3d at 1112.

As a threshold matter, we agree with the district court that although Stephens's federal discrimination case was settled and Obrist was not required to appear in court, his expressive conduct includes not only the affidavit that he filed on Stephens's behalf and his testimony at the grievance hearing but also his agreement to be listed as a witness in the judicial proceedings. "Non-verbal conduct implicates the First Amendment when it is intended to convey a 'particularized message' and the likelihood is great that the message would be so understood." *Nunez v. Davis,* 169 F.3d 1222, 1226 (9th Cir. 1999) (quoting *Texas v. Johnson,* 491 U.S. 397, 404, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989)); *see also Thomas v. City of Beaverton,* 379 F.3d 802, 2004 U.S. App. LEXIS 16739, No. 03-35120, 2004 WL 1811992 *5-6 (9th Cir. Aug. 16 2004). By agreeing to be listed as a witness, Obrist conveyed the "particularized message" that he intended to testify in support of Stephens's claim along the lines set forth in his affidavit and in the summary witness statement. *See Pro v. Donatucci,* 81 F.3d 1283, 1291 (3d Cir. 1996) (holding that a public employee was not precluded from bringing a First Amendment retaliation claim simply because she was not called to testify when she appeared in court as a potential witness).

A. Matter of Public Concern

Whether a public employee or contractor's expressive conduct addresses a matter of public concern is a question of law. *Connick v. Myers,* 461 U.S. 138, 148 n.7, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). This determination is made in light of "the content, form, and context" of the expressive conduct "as revealed by the whole record." *Id.* at 147-48. "Speech that concerns issues about which information

is needed or appropriate to enable the members of society to make informed decisions about the operation of their government merits the highest degree of first amendment protection." *Coszalter v. City of Salem,* 320 F.3d 968, 973 (9th Cir. 2003) (internal quotations and citations omitted). In contrast, "speech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of government agencies, is generally not of public concern." *Id.* (internal quotations and citations omitted).

The district court concluded that Obrist's expressive conduct was "in the nature of a private grievance rather than a matter of public concern" because it determined that his primary motivation for providing assistance to Stephens was to curry favor with him in the hope that he might provide assistance in resolving Alpha's dispute with the County. The district court drew this conclusion from the union attorney's cross-examination of Obrist during Stephens's grievance hearing:

> Q: Okay. In the course of your conversation with [Stephens's attorney] yesterday, did he tell you, "If you help us, we will help you?"
>
> A: Well, basically, yeah, I mean when he called – I – when he called me I told him that I had a situation and I asked him if he had heard that I had a situation and he said that he had heard – you know, that I had some concerns about the County. He wouldn't tell me how he found out about it, so being that I had my situation going where I written [sic] a letter to the County, that I – if I would come down and help Curtis, and he could help me. But, again, like I told him I didn't really want to come here today, I wasn't sure if I should come here. I don't want to sue the County.

> Maybe – I mean maybe I should; I don't know. I mean I feel there has been some injustice done to me and I think I can make some people's lives miserable if I so choose to do that. But that's not really my desire. My desire in life is to get people to work together.

Stephens did subsequently provide assistance to Obrist by filing an affidavit on his behalf detailing the weatherization department's wrongful treatment of Alpha. However, Obrist argues that his response at the grievance hearing, which might charitably be called discursive or rambling, was "far too ambiguous" to establish that his motivations for testifying were purely personal. He contends that, viewing the record in the light most favorable to him, it is reasonable to infer that he was motivated, at least in part, by a desire to expose discrimination, favoritism, and fraud within the County's weatherization department.

Although Obrist's argument appears to have merit, we need not decide whether the district court erred in analyzing his motives for assisting Stephens because we have held that "motive should not be used as a litmus test for public concern; rather, content is the greatest single factor in the *Connick* inquiry." *Havekost v. U.S. Dep't of the Navy,* 925 F.2d 316, 318 (9th Cir. 1991) (internal quotation marks omitted); *accord Roe,* 356 F.3d at 1122. *Connick v. Myers,* 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), the Supreme Court's leading case in this area, illustrates the role that motive plays in the public concern analysis. In *Connick,* a public employee alleged that her supervisors retaliated against her for distributing a questionnaire to coworkers. The Court concluded the employee's motive was, at least in part, "to gather ammunition for

another round of controversy" in her individual personnel dispute. *Id.* at 148. It held that the questions pertaining to office morale, the need for a grievance committee, and the office transfer policy did not address matters of public concern and, thus, declined to consider them further. However, it held that one of the questions – whether employees felt pressure to work on political campaigns – did address "a matter of interest to the community," *Id.* at 149, and proceeded to apply the balancing test to that part of the claim. If motive alone were critical, the Court would not have treated the political pressure question differently from the others listed in the questionnaire.

"In a close case, when the subject matter of a statement is only marginally related to issues of public concern, the fact that it was made because of a grudge or other private interest . . . may lead the court to conclude that the statement does not substantially involve a matter of public concern." *Johnson v. Multnomah County,* 48 F.3d 420, 425 (9th Cir. 1995); *see also Pool v. VanRheen,* 297 F.3d 899, 907-08 (9th Cir. 2002); *Weeks v. Bayer,* 246 F.3d 1231, 1235 (9th Cir. 2001). This is, however, not a close case. The issue before the court in the case in which Obrist agreed to testify as well as at the grievance hearing – race and age discrimination by a governmental employer – was unquestionably a matter of public concern.

We have previously held that proceedings before a judicial or administrative body constitute a matter of public concern if they bring to light potential or actual discrimination, corruption, or other wrongful conduct by government agencies or officials. *See Lytle v. Wondrash,* 182 F.3d 1083, 1087-88 (9th Cir. 1999); *Rendish v. City of Tacoma,* 123 F.3d 1216, 1223-24 (9th Cir. 1997). Unlike the plaintiffs in the cited cases, Obrist was not a party to the

grievance or lawsuit at issue. However, his testimony at the grievance hearing, as well as the affidavit that he filed and his agreement to be listed as a potential witness in Stephens's lawsuit, all helped expose discrimination and other wrongdoing by County personnel. Because the "subject matter" of Obrist's expressive conduct was not "only marginally related to issues of public concern," *Johnson,* 48 F.3d at 425, his motives for providing assistance to Stephens are of no relevance to the public concern inquiry.[6] The defendants argue that Obrist's expressive

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[6] We have assumed that witnesses are treated the same as parties for purposes of the public concern analysis. However, it is worth noting that other circuits are divided over whether the context of a courtroom appearance raises a public employee witness's testimony to the level of public concern, regardless of its content. The Third and Fifth Circuits hold that it does. *See Green v. Philadelphia Hous. Auth.,* 105 F.3d 882, 887 (3rd Cir. 1997); *Johnston v. Harris County Flood Control Dist.,* 869 F.2d 1565, 1578 (5th Cir. 1989). However, four other circuits have declined to adopt this per se rule. *See Arvinger v. Mayor & City Council of Baltimore,* 862 F.2d 75, 77-78 (4th Cir. 1988); *Wright v. Illinois Dept. of Children & Family Servs.,* 40 F.3d 1492, 1505 (7th Cir. 1994); *Padilla v. South Harrison R-II Sch. Dist.,* 181 F.3d 992, 996-97 (8th Cir. 1999); *Maggio v. Sipple,* 211 F.3d 1346, 1352-54 (11th Cir. 2000). Although the Tenth Circuit's approach is not entirely clear, it has cited Third and Fifth Circuit cases favorably and recognizes that "a witness's sworn testimony in a court proceeding is entitled to heightened protection under the First Amendment." *Lytle v. City of Haysville,* 138 F.3d 857, 864 n.2 (10th Cir. 1998); *see also Worrell v. Henry,* 219 F.3d 1197, 1204-05 (10th Cir. 2000). The Second Circuit, after noting that "the paramount importance of judicial truth-seeking means that truthful trial testimony is almost always of public concern," declined to decide this issue in a recent case because, even under the more restrictive approach, the content of the employee's testimony supported a finding that the speech was of public concern. *Catletti ex rel. Estate of Catletti v. Rampe,* 334 F.3d 225, 230 (2d Cir. 2003). We recently indicated that a public employee's speech in support of a co-worker's grievance may be treated differently than "employment grievances in which the employee is complaining about [his] *own* job treatment." *See Thomas,* at 808 (emphasis in the original). However, we need not decide whether a

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conduct does not merit constitutional protection because Stephens, like the plaintiff in *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 420 (7th Cir. 1988), did nothing "to distinguish this case from the run-of-the mine single-plaintiff discrimination case." In *Rendish*, we discussed a number of Seventh Circuit cases including *Yatvin*, before holding along with that Circuit that "in order to be constitutionally protected under either the Speech Clause or the Petition Clause, a public employee's actions must involve a matter of public concern." 123 F.3d at 1222. In following the Seventh Circuit, we rejected the Third Circuit's rule that under the Petition Clause public employees are protected against retaliation for having filed a lawsuit even if the lawsuit addresses matters of purely private concern. We did not, and do not now, however, adopt *Yatvin's* narrow view that a "run-of-the mine single-plaintiff discrimination case" does not meet the public concern test. We have never required that discriminatory conduct or corruption must occur with regularity or any degree of frequency, or exceed some threshold of significance, in order to satisfy the public concern test. Rather, "we have held that when government employees speak about corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees, . . . their speech is inherently a matter of public concern." *Ceballos v. Garcetti*, 361 F.3d 1168, 1174 (9th Cir. 2004); *see also Voigt v. Savell*, 70 F.3d 1552, 1560 (9th Cir. 1995). That rule applies to invidious discrimination as well – whether it consists of a single act or a pattern of conduct. Disputes

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public employee witness's testimony is of public concern regardless of its content, because, as in *Catletti*, 334 F.3d at 230, the expressive conduct at issue here is of public concern even under the more restrictive approach.

over racial, religious, or other such discrimination by public officials are not simply individual personnel matters. They involve the type of governmental conduct that affects the societal interest as a whole – conduct in which the public has a deep and abiding interest. Litigation seeking to expose such wrongful governmental activity is, by its very nature, a matter of public concern.

The defendants contend that, even if Stephens's grievance hearing and lawsuit touched upon matters of public concern, Obrist's expressive conduct should not be afforded constitutional protection because it primarily "concerned obscure details of the technical aspects of County weatherization work." Obrist's testimony at the grievance hearing, and his affidavit and witness statement in the lawsuit, might have been technical, but they were offered to support complaints of racial and age bias. In the lawsuit, Stephens needed to introduce evidence explaining the mechanics of weatherization work in order to establish that he was a competent employee and, thus, rebut the County's assertion that he was fired on the basis of his deficient performance. Similarly, in the grievance hearing, Obrist's testimony was useful in showing that, had Stephens's union conducted a good faith investigation, it would have found that he had a legitimate claim of discrimination against the County. Were it the law that testimony regarding technical details could never satisfy the public concern test, public employees would likely be reluctant to serve as expert witnesses or divulge their specialized knowledge, such as explanations of quantitative data and technologically sophisticated processes, in cases involving discrimination, bribery, bid-rigging, or embezzlement, even though such testimony is often crucial in exposing the governmental wrongdoing at issue.

Accordingly, we hold that a public employee's testimony addresses a matter of public concern if it contributes in some way to the resolution of a judicial or administrative proceeding in which discrimination or other significant government misconduct is at issue – even if the speech itself would not otherwise meet the *Connick* test were we to consider it in isolation. *See Herts v. Smith,* 345 F.3d 581, 585-86 (8th Cir. 2003) (holding that a school official's testimony in a desegregation lawsuit constituted a matter of public concern even though it included comments about her own employment situation); *Reeves v. Claiborne County Bd. of Educ.,* 828 F.2d 1096, 1098 (5th Cir. 1987) (holding that the plaintiff's "generally 'neutral'" testimony concerning the operation of a public program merited protection because the underlying suit sought to expose wrongdoing in that program).

Conversely, we conclude that the public concern doctrine may be implicated by the nature of the specific testimony, even if the judicial or administrative proceeding is not otherwise of public interest. Either one, the testimony or the proceeding, by itself, may be sufficient. Specifically, if a witness's testimony directly addresses governmental corruption or discrimination, it can satisfy the public concern test, even if it is offered in the course of a judicial or administrative proceeding that involves only purely private grievances or issues. *Cf. Thomas,* 2004 U.S. App. LEXIS 16739, 2004 WL 1811992 at *4-7 (holding that a public employee's expressive conduct in support of a co-worker in her personnel dispute was a matter of public concern because it helped expose potential government misconduct). So long as either the public employee's testimony or the underlying lawsuit meets the public concern test, the employee may, in accord with *Connick,* be

afforded constitutional protection against any retaliation that results.[7]

B. Actionable Adverse Actions

Because the district court determined that Obrist's expressive conduct did not address matters of public concern, it did not consider the other factors we must examine when analyzing First Amendment retaliation claims. The defendants argue that, even if the district court erred in its application of the public concern test, we should uphold summary judgment on the basis of the other factors. We disagree.

The defendants first argue that there is no evidence that the plaintiffs suffered any adverse action that is cognizable under § 1983. They contend that Alpha failed to win any contracts between August 2000 and September-October 2002 because its bids were higher than its competitors', not because of retaliation. However, the comparative summary of bid tabulations for the seven contractors that entered into 2000 master contracts reveals that there are several categories in which Alpha was either the lowest bidder or was within such a close range that it should have received at least some contracts if the lowest bidder was disqualified for some reason. Accordingly, the summary and other evidence in the record raise a genuine issue of fact as to whether the defendants subjected the plaintiffs to actions that were reasonably

[7] Because Obrist assisted in proceedings designed to expose discrimination by County employees, we need not decide whether his complaints on cross-examination during Stephen's grievance hearing about his own unfair treatment by the County would have independently satisfied the public concern test.

likely to deter Obrist from continuing to engage in First Amendment activity. *See Coszalter,* 320 F.3d at 975-76. At trial, the defendants will have the opportunity to prove that they would have taken the same actions even in the absence of a retaliatory motive but this issue is not appropriate for resolution at the present stage of the proceedings. *See Ceballos,* 361 F.3d at 1181.

C. Substantial or Motivating Factor

The defendants contend that the plaintiffs cannot meet their burden of establishing that retaliation was a substantial or motivating factor in the defendants' actions because there is no evidence that Hansen, Swendsen, or their superiors had any knowledge of the expressive conduct against which they allegedly retaliated. *See Keyser v. Sacramento City Unified Sch. Dist.,* 265 F.3d 741, 750-52 (9th Cir. 2001). Viewing the evidence in the manner that we must, the record reveals that even if Hansen and Swendsen were not aware of the precise content of Obrist's affidavit and witness statement, or of his testimony at the grievance hearing, they knew that he was supporting Stephens's actions against the County and that Stephens was asserting in these actions that they had discriminated against him. Finally, although Hansen and Swendsen were not present in the room when Obrist testified at Stephens's grievance hearing, he talked with them in the hallway outside. An Alpha foreman told Swendsen about the assistance that Obrist was providing to Stephens in his lawsuit. It is reasonable to infer that Hansen and Swendsen were aware that it was detrimental to their interests to have testimony in Stephens's grievance and lawsuit from someone like Obrist, who had publicly opposed their management practices in the past.

Their knowledge of the precise details of his testimony is less crucial than their awareness that he assisted a former County employee who was publicly accusing them of racial and age discrimination. At the very least, there is a genuine issue of material fact regarding Hansen and Swendsen's knowledge of Obrist's expressive conduct.

The plaintiffs are required, however, to provide more than "mere evidence" that the defendants were aware of Obrist's expressive conduct in order to establish a genuine material dispute as to whether retaliation was a substantial or motivating factor for their conduct. *Keyser,* 265 F.3d at 751. In addition, the plaintiffs must: (i) establish proximity in time between Obrist's expressive conduct and the allegedly retaliatory actions; (ii) produce evidence that the defendants expressed opposition to his speech, either to him or to others; or (iii) demonstrate that the defendants' proffered explanations for their adverse actions were false and pretextual. *Coszalter,* 320 F.3d at 977; *Keyser,* 265 F.3d at 751-52.

The defendants contend that a jury could not infer retaliatory intent on the basis of timing alone because the new Alpha contract went into effect in July 2000, more than seven months after Obrist filed an affidavit in Stephens's lawsuit in November 1999 and fifteen months after his testimony at the grievance hearing in April 1999. The defendants miscalculate, however. Planning for the new master contracts began in the early months of 2000, when the defendants began to revise the provisions of the old versions in order to "Rob proof" the new ones.

Accordingly, less than three months elapsed between the time when Obrist filed his affidavit and agreed to serve as a witness in Stephens's lawsuit and the time

when the defendants began drafting the new anti-Obrist contracts. This period is within the three-to-eight-month time range that "easily" supports an inference of retaliation. *Coszalter,* 320 F.3d at 977. Nor is the approximately nine-month period between Obrist's testimony at the grievance hearing and the time planning commenced for the new contracts necessarily outside the acceptable range of proximity. We have declined to hold that any period is *per se* too long because there are a variety of reasons why retaliators choose to wait before acting. *Id.* at 977-78. In this case, the defendants obtained far greater discretion under the 2000 contracts to deny work to Alpha without revealing their retaliatory motives than they had under the 1996 contracts, especially after the County, by settling with Obrist, effectively conceded that there had been problems in the bidding practices under the old versions. The defendants point out that Alpha received more work in the nine months after Obrist testified at the Employment Relations Board than it did in the two years prior to the grievance hearing. However, this temporary increase serves only to illustrate further that the defendants may have strategically postponed their retaliation until after the new contracts, with their increased options for discretionary denial of work assignments, went into effect.

The plaintiffs also introduced evidence that the defendants expressed opposition to Obrist's expressive conduct, most notably, Hansen's statements that she intended to fix it so Alpha would not receive further work from the County. The defendants argue that this evidence does not establish their specific intent to retaliate against Obrist's expressive conduct as opposed to their long-standing personal animosity towards him as well as the low-esteem in which they held Alpha's work. However,

there is ample evidence that the anti-Obrist statements by Hansen and Swendsen increased in number and severity after Obrist provided assistance to Stephens. In any event, it is not fatal to the claim of a public employee or contractor that his expressive conduct may not be the only factor motivating the government officials to subject him to an adverse action. "As with proof of motive in other contexts, this element of a First Amendment retaliation suit . . . involves questions of fact that normally should be left for trial." *Ulrich v. City & County of San Francisco,* 308 F.3d 968, 979 (9th Cir. 2002) (citing *Hunt v. Cromartie,* 526 U.S. 541, 542, 143 L. Ed. 2d 731 (1999)). Accordingly, we hold that the plaintiffs have introduced sufficient evidence to establish that there is a material dispute as to whether retaliation was a substantial or motivating factor of the defendants' actions.[8]

D. Balancing Test

The defendants further argue that we should uphold the grant of summary judgment on the alternative ground that the balancing analysis set forth in *Pickering,* 391 U.S.

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[8] The defendants also contend that Hansen and Swendsen were not in a position to retaliate against Obrist because they did not have decision-making authority in the development of the new contracts or in the contract bidding process. Here, too, there is a material dispute. Several County personnel and other contractors shared Obrist's view that Hansen and Swendsen exercised de facto control over the weatherization department and used their power to retaliate against Alpha. *See supra* n.3. Moreover, "a subordinate cannot use the nonretaliatory motive of a superior as a shield against liability if that superior never would have [acted adversely] but for the subordinate's retaliatory conduct." *Strahan v. Kirkland,* 287 F.3d 821, 826 (9th Cir. 2002) (quoting *Gilbrook v. City of Westminster,* 177 F.3d 839, 854-55 (9th Cir. 1999)).

at 568, weighs in their favor. The defendants have the burden of identifying legitimate governmental interests that outweigh the public's interest in Obrist's expressive conduct. *Umbehr,* 518 U.S. at 675-76; *Ceballos,* 361 F.3d at 1178. The legitimate interest that the defendants advance is the efficient provision of weatherization services to as many low-income people as possible. However, the defendants do not explain how Obrist's expressive conduct decreased the efficiency of the County's weatherization program, and we can conceive of no possible explanation. The County's interest in efficiency would not have been advanced in any way by Obrist's remaining silent on the subject of race or age discrimination.

On the other side of the equation, the public has a strong interest in Obrist's expressive conduct because he sought to assist in the exposure of racial discrimination and other wrongdoing by government officials. *Ceballos,* 361 F.3d at 1178 ("The 'more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made.'" (quoting *Johnson,* 48 F.3d at 426)). Whether or not Obrist arranged a quid pro quo agreement with Stephens, there is no suggestion that his testimony or affidavit were untruthful. *Cf. Moran v. Washington,* 147 F.3d 839, 849 (9th Cir. 1998). Accordingly, the defendants are not entitled to summary judgment on the ground that the government's legitimate interests outweigh the First Amendment interest in Obrist's expressive conduct.

In sum, we decline to affirm summary judgment with respect to the plaintiffs' § 1983 First Amendment retaliation claim on any of the grounds raised by the defendants,

including those that the district court considered and those that it did not.[9]

III. Supplemental Oregon State Law Claim

The district court granted summary judgment on the plaintiffs' supplemental Oregon law claim for intentional interference with contractual relations on the ground that they did not raise a genuine issue of material fact as to whether Hansen and Swendsen acted solely for their own benefit. *See McGanty v. Staudenraus,* 321 Ore. 532, 901 P.2d 841, 845-49 (Or. 1995); *see also Sims v. Software Solutions Unlimited, Inc.,* 148 Ore. App. 358, 939 P.2d 654, 657-59 (Or. Ct. App. 1997). According to the district court, the plaintiffs established, at most, that Hansen and Swendsen had mixed motives for their actions.

Even if Hansen and Swendsen's actions may have furthered the goals of the weatherization program, it does not necessarily follow that they intended to promote the County's policy objectives when they made their decisions regarding the award of work assignments to Alpha. Rather, a jury could reasonably infer from the evidence offered by the plaintiffs that the two individuals manipulated the County's contracting procedures solely to satisfy their own personal grudges against Alpha and Obrist. *See McGanty,* 901 P.2d at 848; *see also Schram v. Albertson's, Inc.,* 326 Ore. 62, 146 Ore. App. 415, 934 P.2d 483, 492 (Or. Ct. App. 1997).[10] This is a question of motive or intent best

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[9] We remand the issue of County liability under § 1983 for the district court to consider in the first instance.

[10] In contrast to their § 1983 claim, the plaintiffs need not prove that retaliation against Obrist's expressive conduct was a substantial or motivating factor for their adverse actions in order to recover for

(Continued on following page)

left to a jury to resolve. *See Ulrich,* 308 F.3d at 979. Accordingly, we reverse the district court's order granting summary judgment on the plaintiffs' supplemental Oregon state law claim.

IV. Conclusion

For the foregoing reasons, we **REVERSE** the district court's summary judgment order with respect to the plaintiffs' § 1983 First Amendment retaliation claim and their supplemental state law claim of intentional interference with contractual relations and **REMAND** for further proceedings.

REVERSED AND REMANDED.

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tortious interference with contractual relations under Oregon law. The specific reason for their personal grudge against the plaintiffs is irrelevant so long as they acted solely for their own, and not the County's, benefit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ALPHA ENERGY SAVERS, INC., an Oregon Corporation, and ROBERT OBRIST, Plaintiffs, v. MULTNOMAH COUNTY, et al., Defendants.	)	Civil No. 01-1363-KI OPINION

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KING, Judge:

Plaintiffs Alpha Energy Savers, Inc. ("Alpha") and its owner, Robert Obrist, weatherized homes pursuant to a contract with defendant Multnomah County ("County"). Plaintiffs allege that defendants stopped awarding them work in retaliation for testifying on behalf of a former County employee who sued the County in a discrimination case. Before the court is Defendants' Motion for Summary Judgment and Motion to Substitute County as Defendant (#56). For the reasons below, I grant summary judgment against all claims.

FACTS

I. The Weatherization Program

The County's Weatherization program provides weatherization services to low income County residents through separate contracts with private contractors, seven in number under the current contract. Lolenzo Poe is the Director of the Department of Community and Family Services ("DCFS"), which includes the Weatherization program. Poe has the final policy-making authority for DCFS.

Cecile Pitts has supervised the Weatherization program since October 1999. Pitts supervises defendants Hansen and Swendsen.

Defendant Diane Hansen has worked in the County's Weatherization program since 1989. From 1997 to June 30, 2001, Hansen processed applications from residents for weatherization services, sent work orders to the appropriate weatherization vendor, and maintained the files for each work order. Since July 1, 2001, Hansen stopped performing those duties and primarily maintained the paperwork concerning the finding of the Weatherization program.

Defendant Judy Swendsen has worked in the Weatherization program since 1985, with her primary responsibility since 1997 being inspecting the work of the weatherization contractors for compliance with the program's specifications.

All contractors who meet the contract requirements and submit bids receive a contract. The County uses the contractors' bids to determine the lowest bidder for each home receiving weatherization services and awards work

to the lowest bidder on each home, with exceptions concerning uncompleted work, work over the bonded amount, and assignments to the Welfare to Work crew. Pitts states that she, and not Hansen or Swendsen, has the decision-making authority about the award of work to the lowest bidder. According to Pitts, the goal of the Weatherization program is to provide high quality, safe weatherization services to as many low-income County residents as possible. To maximize the number of homeowners who benefit, the 2000 Contract requires that the lowest bidding vendor receive the work orders as frequently as possible. Pitts approved of changes in the 2000 Contract to meet this goal.

Alpha has one of the contracts with the County under which Alpha bids competitively for individual jobs to provide weatherization services. Alpha, along with other contractors, had a multi-year contract beginning in 1996 ("1996 Contract") and another beginning in July 2000 ("2000 Contract"). Other than the bid amounts, the terms of the 2000 Contract are the same for the seven weatherization contractors.

II. Complaints Against the County

On February 9, 1999, Obrist called Pitts to complain that Alpha was receiving less work from the County since August 1998. Obrist sent Pitts a letter dated March 24, 1999, about the same concern. Obrist kept up his complaints about a reduction in work until February 2000. Assistant County Attorney John Thomas determined that the Weatherization program erred in the administration of the 1996 Contract by not always awarding the job to the lowest bidder. Because of this, Thomas directed that the

County discontinue all pressure diagnostics work under the 1996 Contract as of December 1, 1999. The County entered into a settlement agreement with Alpha and paid it damages. There were contractors other than Alpha who wrongfully lost out on contracts but none of the others made a claim.

In 1998, a former County employee in the Weatherization program, Curtis Stephens, filed a claim against his union with the Oregon Employee Relations Board ("ERB"). Obrist testified at Stephens' ERB hearing in April 1999 as a weatherization expert. During his testimony, Obrist complained about how the County, Hansen, and Swendsen treated him unfairly by not giving him work and Swendsen's opinion of Stephens' work. Hansen also testified at the ERB hearing. Although Hansen saw Obrist in the hallway outside the hearing room and understood that he was testifying on behalf of Stephens, she did not hear his testimony and has never learned the content of his testimony at the hearing. Similarly, Swendsen saw Obrist while waiting to testify but never learned the content of his testimony. Obrist believes that Hansen and Swendsen must have heard of the content of his testimony but he has nothing specific to back up his belief.

In 1999, Stephens brought a discrimination claim against the County in federal court. Obrist filed an affidavit on Stephens' behalf in that case and was listed as a trial witness in a witness statement that is similar in content to the affidavit. The affidavit stated: (1) Stephens' work was as good as all other employees in the Weatherization program; and (2) Swendsen and Hansen were very biased against Stephens and were working towards the goal of removing Stephens from the program. Hansen and Swendsen state that neither knew that Obrist had taken

these steps on Stephens' behalf in the federal case until Obrist filed the case before me. The federal case settled before Obrist testified. Again, Obrist believes that Hansen and Swendsen must have read his affidavit and witness statement but he has nothing specific to back up his belief.

Terrance McKilligan, a foreman for Alpha, disputes Hansen's and Swendsen's statements. McKilligan states that in October 1999, he was at an inspection with Swendsen and he told her that Obrist would be signing an affidavit and testifying in Stephens' federal case about pressure diagnostics. According to McKilligan, after he gave this information to Swendsen, she starting bringing a second inspector, Jay Burco, and the County's welfare to work crew along on all of her inspections of Alpha's work. A second inspector meant that there was little time to correct any defects because the two inspectors could complete their work faster than a single inspector. Swendsen typically required Alpha to complete work to a higher specification than that stated in the contracts.

According to Pitts, Alpha received more work in the year following Obrist's testimony at the ERB hearing than it had in the two-year period prior to his testimony. Obrist provides the following data concerning Alpha's business with the County: $543,898 in 1991; $364,977 in 1992, $65,706 in 1996, $51,981 in 1997, $6,662 in 1998, $34,880 in 1999 after Obrist hired an attorney and made a claim against the County, discussed in more detail below, $4071 in 2000.

III. The 2000 Contract

In early 2000, Hansen sent a request to the Contracts unit of DCFS asking that they prepare and send out an

Invitation for Bids because the 1996 Contract was set to expire during 2000. Hanson and Swendson [sic] state that their only involvement in the preparation of the 2000 Contract was as a resource regarding technical aspects of the specifications. Thomas prepared the 2000 Contract except for the technical specifications. He redrafted the 2000 Contract to remove ambiguous terms that were used in the 1996 Contract. In particular, Thomas completely rewrote the termination, temporary restriction, and permanent restriction provisions to make them clearer. Thomas also made changes to allow the County the maximum flexibility to use weatherization funds to provide weatherization work at the lowest price to the most homes: (1) to permit rather than require the County to place a contractor on restriction from receiving awards of contracts for minor technical administrative violations; and (2) to allow the delay of issuance of contracts if the low bidder was unable to receive contracts because he no longer had sufficient bond capacity or had too many jobs outstanding.

Obrist put Alpha on voluntary restriction and did not accept any work from the County from March 17, 2000, to May 5, 2000. He did so because the County extended the 1996 Contract into 2000 without increasing the bid rates, the County insisted that only Alpha complete all of its work within 40 days, rather than 90 days as allowed under the 1996 Contract, and Swendson [sic] failed Alpha's work after performing improper inspections. As the 1996 Contract drew to a close on June 30, 2000, the County limited the number of work orders to ensure that they were all completed, invoiced, and paid before the end of the contract period.

In mid-July 2000, Obrist called Pitts to express concerns about the 2000 Contract. She wrote a letter in response dated July 26, 2000, providing information on the number of jobs awarded under the 2000 Contract so far and giving information on when Alpha and other contractors were entered into the computer process that determines the lowest bidder, once they signed the new contract. From July 23 to August 10, 2000, Alpha voluntarily restricted itself from receiving any work under the 2000 Contract.

According to Pitts, Alpha has generally not been the low bidder under the 2000 Contract and thus has received only one work order under this contract, out of over one thousand work orders issued This was in spite of the fact that Alpha's contract was tentatively funded for $100,000. To ensure that work orders are awarded to the lowest bidder as frequently as possible, Pitts reviews work orders before they are issued to contractors unless she is out of the office.

IV. Obrist's Complaints of Unfair Treatment

From July until November 20, 2000, Pitts states that Obrist made numerous allegations against the County, Hansen, and Swendsen, including charges of favoritism, unprofessional behavior and corruption, falsification of County records, and a management cover-up of problems in the Weatherization program. Pitts considers the allegations to be virtually identical to those made by Obrist since February 1999.

On September 18, 2000, Obrist sent a letter of complaint to the federal Department of Energy ("DOE") which funds a large portion of the Weatherization program.

Obrist accused Hansen and Swendsen of ethical violations, conflicts of interest, and contractual fraud. He stated that he was subpoenaed in the Stephens case but does not contend that his lack of work is in retaliation for his possible testimony. The DOE investigated but has made no written findings of wrongdoing by the County.

In November 2000, Obrist complained to Poe, who asked one of his managers and a supervisor of Pitts, Kathy Tinkle, to investigate. Pitts assisted Tinkle in conducting an investigation under the guidance of Assistant County Attorney Thomas. After investigating, Thomas concluded that Obrist's complaints were unfounded.

V. Evidence of Unfair Treatment

In his deposition, Obrist testified that Hansen and Swendsen had been prejudiced against Alpha since the early 1990s, starting sometime between 1992 and 1995. Obrist believes that Swendsen would "nitpick" his employees' work during her inspections, ask them to do work that was not part of the contract, and make negative comments that Alpha employees cannot be trusted, that Obrist was getting rich off the County, and that Alpha's work was substandard. William Haskell, a PGE contractor who served with Hansen on a state advisory group for weatherization, heard Hansen warn that Alpha brought suit because it found a way to generate income without having to do the work. Obrist believes that the negative comments and unfair awarding of work escalated after he testified at Stephens' ERB hearing.

Obrist believes that Hansen exclusively refers prospective customers who do not qualify for the County program to two of his competitors. Dave Lutes, a County

employee, has overheard Hansen making these references. Juan Padron, who was a co-owner of another contractor, was given names by Swendsen of prospective customers who did not qualify for the County program. Padron also heard Swendsen say prior to 1996 that she did not like Alpha's method of installing a rubber membrane roof on mobile homes.

Plaintiffs submitted affidavits from numerous people in the local weatherization business who attest to the high quality of Alpha's work. Some attested to difficulties working with Swendsen and Hansen and the favoritism they show to particular contractors. Other Alpha employees stated that Swendsen was much more demanding than inspectors from similar programs at Washington County or Portland General Electric. She would require the crew to be present at the inspection, while the other two did not, and would ask for extra work to be done that was beyond what was specified in the contract. This resulted in the jobs being unprofitable for Alpha.

Stephens heard Hansen say at Weatherization program staff meeting that she was going to "Rob [Obrist] proof the weatherization contract" Another Weatherization program employee, David Lutes, also heard this remark. Stephens heard both Hansen and Swendsen say that Obrist needs to go out of business and that they wish Obrist would go out of business. Stephens believes that Hansen and Swendsen disliked the fact that Obrist would challenge their views.

Linda Perfili was a County employee who worked on the same floor as the Weatherization program and was a friend of Hansen. Hansen would confide in Perfili and call Obrist an "asshole" and a "jerk." Hansen told Perfili that

Obrist was stalking Hansen and Swendsen. Hansen also told Perfili that she was fixing it so that Obrist would not get any work from the County.

McKilligan testified to numerous instances up through 1999 in which he believes Swendsen inspected his job unfairly: (1) changing the work during an in-progress inspection so that the crew would not have the proper materials; (2) inspecting the unfinished part of the job during an in-progress inspection; (3) using inaccurate inspection methods; and (4) asking him to slow his crew down because the clients were concerned that the job was not high quality due to the speed the work was being performed. Swendsen would send letters concerning McKilligan's performance to Obrist. She told Obrist that it was unacceptable for McKilligan to be promoted to foreman.

McKilligan studied County records of the bid process for jobs under the 2000 Contract. He has discovered nine invoices which Richart Family submitted late, which should have resulted in that company not being awarded additional work during the time, but did not. Pitts studied the information McKilligan assembled and states that McKilligan analyzed the documents incorrectly, probably due to a misunderstanding of the meaning of one of the fields printed. During this litigation, the County performed a limited audit which found only four days between May 1, 2000, and June 8, 2002, on which multiple work orders were issued to Richart Family when it had work outstanding past 60 days. The auditor determined that the computer program which makes the initial determination was programmed for a 90 day period rather than a 60 day period. Pitts also notes that the 2000 Contract gives the

County the discretion to award work to the lowest bidder, even if it is out of compliance with the 60-day target.

McKilligan has identified other invoices in which Alpha underbid Richart Family but did not get the work. He also discovered that low bid sheets were missing from most of the weatherization files the County provided for inspection after Alpha made a request for public records. McKilligan found other jobs in which Eastside was the low bidder but was over its bond and the County gave the work to Richart Family rather than hold it for Eastside. McKilligan also found instances in which Swendson [sic] certified a job as completed but other paperwork indicates that it was still in progress. This affects the number of jobs a contractor has open under its bond.

Lutes, a weatherization auditor for the County, heard Hansen in a meeting call Obrist the "anti-Christ" Hansen told Lutes to stop running low bid sheets because Alpha was frequently the lowest bidder on the sheet and because Obrist was asking for the sheets. Lutes also states that Hansen and Swendsen falsify documents within the weatherization files and change the lowest bidder on the low bid sheets. He has heard Hansen and Swendsen refer callers who do not qualify for the County program to private contractors, but they only make references to Richart Family and Advanced, two competitors of Alpha.

During an audit, Lutes used to make specific recommendations to solve problems he found in homes. In May 2002, Pitts told him that he could not do so any longer, but could only recommend "test and report," leaving the type of repair up to the contractors. Lutes states that this circumvents the low bid process because all "test and report" items are referred by Hansen and Swendsen

exclusively to Richart Family. Lutes has also seen Eastside Insulation receive jobs even though it was over its bond. Lutes has seen jobs on which Alpha is the low bidder being assigned by Swendsen to the Welfare to Work crew. Lutes has not seen this switch made when Richart Family or Eastside Insulation is the low bidder.

Jay Burco is the County employee who is the Training Coordinator for the Welfare to Work program. As a teaching tool, he has taken the work crew to inspect jobs done by almost all of the weatherization contractors. The Welfare to Work crew does not bid for jobs against the other contractors. Either Burco, Swendsen, or a third County employee handpick jobs that are appropriate for the skill level of the crew.

LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.), *cert. denied*, 528 U.S. 375 (1999).

DISCUSSION

I. Motion to Strike

Defendants move to strike large portions of most of the affidavits submitted by plaintiffs for lack of relevance, hearsay, lack of personal knowledge, and testimony inconsistent with deposition testimony.

Because I do not rely on many of the paragraphs of testimony that defendants object to, those particular objections are moot and I will not rule on them. I also decline to rule on the individual paragraphs which defendants contend are not relevant. If I included a fact in the discussion above, I consider the fact to be relevant to the issues before me or necessary as background information.

I will discuss in more detail some of defendants' other objections.

Defendants move to strike paragraphs 18, 19, and portions of 25 and 27 of the Lutes Affidavit because they contend the affidavit is inconsistent with Lutes' deposition testimony.

Affidavits which are inconsistent with prior deposition testimony given by the affiant should be stricken if the court makes a factual determination that the contradictory matter is actually a "sham" and not the result of an honest discrepancy, a mistake, or the result of newly discovered evidence. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991).

In his deposition taken on March 14, 2002, Lutes testified that he has seen weatherization files that were "shady" such as houses being weatherized without audits being done. He also testified that he believes that somebody

has removed low bid sheets he personally put into files, and that it had to be somebody working in the Weatherization program. In his Affidavit dated November 25, 2002, Lutes states that he has seen Hansen and Swendsen tamper with files and change low bid sheets. I cannot say as a matter of law that the Affidavit testimony is a sham because Lutes, as a current employee, may have come across additional information in the eight months between being deposed and signing the Affidavit.

Defendants object to paragraphs 25 and 27 of the Lutes Affidavit that on several occasions, he has seen Alpha named as the low bidder but Swendsen assigns the job to the Welfare to Work crew. Defendants contend that this contradicts Lutes' deposition testimony that he does not know why Alpha does not receive work when it is the low bidder because he does not send the work out of the office. Also in paragraph 25 of the Affidavit, Lutes states that Hansen or Swendsen will make a change to the required work so that Alpha, as the original low bidder, does not get the job because it is not low bidder after the change is calculated. Although I agree there is a contradiction, I again cannot say as a matter of law that it is a sham. Lutes may have had more information at the time of his Affidavit than when he was deposed.

I do not rely on the information in the McKilligan Affidavit, or paragraph 21 in the Obrist Affidavit, that defendants contend is inconsistent with deposition testimony.

Defendants object to paragraph 24 in the Obrist Affidavit in which he states that Lutes and Wilson told him that Hansen was going to deny Alpha work and

wanted him out of the program. I agree that this is hearsay and strike the paragraph.

Defendants object to paragraph 27 in the Obrist Affidavit as inconsistent with Obrist's deposition testimony. The portion of the paragraph that I use above is also in the McKilligan Affidavit, without the use of hearsay, and I will rely on that presentation of the evidence. Similarly, the hearsay drawing objection in paragraph 33 of the Obrist Affidavit is testified to directly in the Lutes Affidavit.

II. Effect of February 2000 Release

Defendants contend that plaintiffs' standing is limited to events occurring after February 1, 2000, because of the release Obrist signed on behalf of Alpha on that date. Plaintiffs do not respond to this argument.

In the release, Alpha releases the County and its employees from all claims which it has or had at any time before the execution of the release arising out of events occurring before the date of the release and relating to the 1996 Contract, including claims for breach of contract for failure to award work to Alpha in accordance with the requirements of the 1996 Contract.

I conclude that liability or damages are limited to conduct occurring after February 1, 2000.

III. Free Speech

Plaintiffs contend that defendants retaliated against them because Obrist testified at Stephens' ERB hearing and agreed to testify at Stephens' trial in federal court.

To prove a First Amendment retaliation claim, a plaintiff must prove that he engaged in constitutionally protected conduct and that this conduct was a substantial or motivating factor for the defendant's adverse decision. Defendants are not liable, however, if they prove that they would have made the same decision without the protected conduct. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568 (1977); *Texas v. Lesage*, 528 U.S. 18, 21, 120 S. Ct. 467 (1999) (no liability if the same decision would be made without the impermissible motive). Alternatively, a public employer defendant is not liable if it proves that its "legitimate administrative interests outweigh the employee's interest in freedom of speech." *Pool v. Vanrheen*, 297 F.3d 899, 906 (9th Cir. 2002) (internal quotation omitted).

A. Expressive Conduct

Defendants contend that the fact that Obrist agreed to be listed as a witness on Stephens' behalf in the federal case is not expressive conduct and did not contain a message sufficient to invoke protection under the First Amendment. They note that because he did not testify, the content of his testimony is entirely speculative and not sufficiently particularized to trigger the First Amendment. Even assuming that Obrist would have testified in accordance with his witness summary, his speech would have been about the quality of Stephens' work, which defendants contend is not a matter of public concern.

Defendants also contend that his status as a witness was not conveyed to anyone in the weatherization department. This argument fails because for purposes of

summary judgment, I must credit McKilligan's testimony that he told Swendson [sic].

Nonverbal conduct can be protected by the First Amendment "when it is intended to convey a particularized message and the likelihood is great that the message would be so understood." *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000) (internal quotation omitted). Nunez was fired after arranging for two court clerks who did not work on a judge's reelection to attend a training session, in spite of the judge's instruction to limit attendees to the court employees who worked in his campaign. The court held that Nunez's expressive conduct in scheduling the training implicated the First Amendment because she intended to convey a message to her co-workers that the judge should not condition benefits on working in his campaign, and the co-workers understood the message. *Id.* Other instances of expressive conduct are listed in *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533 (1989) (burning an American flag at a political demonstration held protesting Reagan's renomination for president, students' wearing of black armbands to protest American military involvement in Vietnam, a sit-in by blacks in a "white only" area to protest segregation, the wearing of American military uniforms in a dramatic presentation criticizing American military involvement in Vietnam, and picketing). Whether conduct is speech is a question of law. *Nunez*, 169 F.3 at 1230.

Students in *Tinker v. Des Moines Independent Community School District*, 303 U.S. 503, 89 S. Ct. 733 (1969), wore black arm bands to school for the last two weeks of December without causing any disturbance. It was well known that the arm bands symbolized objection to the

country's involvement in Vietnam even though no message was written on them. The Court held that the arm bands triggered First Amendment protection. *Id.* at 505. Obrist's agreement to be a witness in Stephens' federal case carries the message that Obrist supported Stephens and was willing to help him prove his discrimination claim against the County. This message is as particularized as the wearing of a black arm band. I conclude that Obrist's agreement to be a witness in Stephens' federal case is sufficiently particularized to be expressive conduct triggering First Amendment protection.

B. Public Concern

Defendants contend that Obrist's testimony at the ERB hearing and his affidavit and witness status in the federal case are not protected speech because they are not about matters of public concern. Defendants note that Obrist testified as a rebuttal witness about technical details of the County's weatherization work, about Alpha's lack of work from the County, and about Hansen and Swendsen. They characterize the testimony as a matter of private concern regarding the internal affairs of the County Weatherization program.

Plaintiffs contend that Obrist's testimony was on a matter of public concern because he testified in support of Stephens' claim that the County's stated reason for his termination was a pretext for the actual discriminatory reason. Similarly for the ERB hearing testimony, plaintiffs contend that Obrist's testimony was needed to show that Stephens had a legitimate claim of racial bias against the County and that his union ignored the claim. Plaintiffs

claim that this is speech on the manner in which the government is operated.

To be protected, the speech must address a matter of public concern. Whether speech is protected is a question of law. *Nunez*, 169 F.3 at 1230.

> "[W]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Speech that is necessary or appropriate to enable citizens to make informed decisions about the operation of their government is of public concern, while speech by public employees addressing individual personnel disputes and grievances is not.

Id. (quoting *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684 (1983)). If the speech contains both information that is a matter of public concern and information that concerns only a private grievance, the speech can still be entitled to First Amendment protection. *Pool v. Vanrheen*, 297 F.3d 899, 907 (9th Cir. 2002). Speech deals with a matter of public concern "when it can be fairly considered as relating to a matter of political, social, or other concern to the community. Speech that deals with complaints over internal office affairs is not protected when it is not relevant to the public's evaluation of a governmental agency's performance." *Nunez*, 169 F.3d at 1226-27 (internal quotation omitted).

The Court extended First Amendment protection to independent government contractors in *Board of County Commissioners Waubaunsee County v. Umbehr*, 518 U.S. 668, 686, 116 S. Ct. 2342 (1996).

The case law concerning speech in the form of testimony draws very fine distinctions.

An Assistant City Attorney was terminated after several instances of speech, including testifying on behalf of an unsuccessful candidate for city employment who sued the city for disability discrimination, in *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998). The employee's other instances of speech were: (1) telling a reporter about allegedly inappropriate remarks by a judge; (2) speaking about the alleged improper disposition of criminal cases for friends and city employees; and (3) supporting a challenger to a sitting judge in an election. The court noted that the public has an interest in unlawful discrimination by the city and held that all of the speech together involved matters of public concern sufficient to support a First Amendment retaliation claim. *Id.* at 1224. I note that the other instances including speech about retaliation for political beliefs, about the biased administration of justice, and about how an elected judge is carrying out his duties, are all clearly matters of public concern.

Plaintiffs affidavit and testimony supporting coworkers' sex and race discrimination case in federal court was the only speech at issue in *Tindal v. Montgomery County Commission*, 32 F.3d 1535 (11th Cir. 1994). The court held that it was a matter of public concern because the speech took place in a public forum, the federal court, and because it supported the claims of other individuals rather than plaintiff's self-interest. *Id.* at 1539-40.

Public employees did not fare so well in other First Amendment retaliation cases. In *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988),

the court held that filing a sex discrimination case was not a matter of public concern adequate to trigger First Amendment protection for retaliation against the original plaintiff, allegedly due to the filing. The court noted that the plaintiff did not seek to advance political or other ideas, did not seek a debate about sex discrimination, and did not attempt to distinguish the case from the "run-of-the-mine single plaintiff discrimination case," but instead wanted to advance her career by obtaining the position that she claims she was denied because of discrimination. The case was not to seek relief against pervasive or systemic misconduct by a public agency. Thus, plaintiff could not prevail on a First Amendment retaliation claim. *Id.* at 419-20.

Similarly, in *Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000), the court held that plaintiff's testimony at a grievance hearing and administrative appeal process on behalf of her supervisor was not a matter of public concern triggering First Amendment protection. Plaintiff alleged that her testimony involved the fair and honest implementation of the agency's personnel policies. The court reasoned that the appropriate inquiry is not whether the public would be interested in the topic but whether the purpose of the speech was to raise issues of public concern. It noted that plaintiff's testimony would curry the favor of plaintiff's supervisor, thus improving the conditions of plaintiff's employment and furthering her personal interest. The court held that plaintiff spoke primarily as an employee upon matters of personal interest and not as a citizen on behalf of the public. *Id.* at 1351-54.

This is a close question. At the ERB hearing, Obrist testified as follows:

> Q Okay. In the course of your conversation with [Stephens' attorney] yesterday, did he tell you, "If you help us, we will help you?"
>
> A Well, basically, yeah, I mean when he called – I – when he called me I told him that I had a situation and I asked him if he had heard that I had a situation and he said that he had heard – you know, that I had some concerns about the County. He wouldn't tell me how he found out about it, so being that I had my situation going where I written a letter to the County, that I – if I could come down and help Curtis, and he could help me. But, again, like I told him I didn't really want to come down here today, I wasn't sure if I should come here. I don't want to sue the County. Maybe – I mean maybe I should; I don't know. I mean I feel there has been some injustice done to me and I think I can make some people's lives miserable if I so choose to do that. But that's not really my desire. My desire in life is to get people to work together.

Tinkle Aff. Ex. 2 at 18.

Obrist was concerned with rectifying his difficulties with the County and testified at the hearing because he believed testifying on behalf of Stephens might assist him. This brings the facts before me closer to *Maggio* than to *Tindal*. I conclude that Obrist's speech is in the nature of a private grievance rather than a matter of public concern. Consequently, it cannot support a First Amendment retaliation claim. I grant summary judgment on behalf of all defendants against the § 1983 First Amendment retaliation claim.

IV. Substitution of Defendants for Common Law Torts

Plaintiffs allege the three common law tort claims against Hansen and Swendsen individually. Defendants ask to substitute the County as the sole defendant in these three claims as required by the Oregon Tort Claim Act, ORS 30.265(1). I grant the request.

V. Intentional Interference with Contractual Relations

Plaintiffs allege that Hansen and Swendsen deliberately interfered with plaintiffs' contract with the County. Plaintiffs further allege that all acts of Hansen and Swendsen occurred within the course and scope of their employment with the County.

Defendants contend that Hansen and Swendsen are not third parties to Alpha's contract with the County and thus cannot be liable for interfering with that contract.

The elements of the tort of intentional interference with economic relations are: (1) the existence of a professional or business relationship, which could be a contract or a prospective economic advantage; (2) intentional interference with the relationship; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and damage to the economic relationship; and (6) damages. *McGanty v. Staudenraus*, 321 Or. 532, 535, 901 P.2d 841 (1995).

A party to a contract cannot tortiously interfere with its own contract. *Sims v. Software Solutions Unlimited, Inc.*, 148 Or. App. 358, 363 n.1, 939 P.2d 654 (1997). In the employment context, an employee can be held liable for interfering with his employer's contract only if the

employee is acting solely for his own benefit. If the employee's actions are taken at least in part to further the best interests of the employer and are taken within the scope of the employee's authority, the employee cannot be liable for this tort. *Id.* at 364-65.

Plaintiffs contend that a jury could find that Hansen and Swendsen worked to deny plaintiffs work for purely personal, retaliatory reasons because of anger that Obrist testified on behalf of Stephens. I disagree. The law requires their motives to be *entirely* personal. There is a great deal of evidence that the County's goal is to reduce costs as much as possible to allow the maximum number of houses to be weatherized. The 2000 Contract gives the County discretion to award work to the lowest bidder, even if they were over their bond or had work outstanding for too much time. Even assuming that Hansen and Swendsen could manipulate the award of work, I believe that a jury must find mixed motives at worst on Hansen's and Swendsen's parts. I conclude that plaintiffs have not raised a factual issue that the women acted solely for their own benefit. Thus, they are not third parties to the contract. I grant summary judgment against the claim for intentional interference with contractual relations.

VI. Intentional Interference with Business Advantage

The tort of intentional interference with business advantage has the same elements as the tort of intentional interference with contractual relations except that the economic relationship is different. *Allen v. Hall*, 328 Or. 276, 281, 974 P.2d 199 (1999). Plaintiffs allege that Hansen and Swendsen intentionally caused the County

weatherization clients not to enter into business relationships with plaintiffs.

I conclude as a matter of law that plaintiffs do not have a business relationship with the County weatherization clients. Alpha is paid with County finds for work under the contracts. Although the weatherization clients benefit from this because their homes are weatherized, they do not have a business relationship with plaintiffs. This is shown by the lack of evidence that the weatherization clients have any input on which contractor is selected to perform the work on their home. I grant summary judgment against the intentional interference with business advantage claim.

VII. False Light

Obrist alleges that Hansen and Swendsen invaded his right to privacy by publicly making false statements about him. He points to Swendson [sic] telling a Welfare to Work crew that Alpha was responsible for blowing out the interior wall of a house when the damage was caused by the crew's error and Swendson [sic] telling Padron that she does not like the quality of Alpha's work.

The tort of the invasion of privacy by portraying the plaintiff in a false light has the following elements:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and

> (b) the actor has knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Magenis v. Fisher Broadcasting, Inc., 103 Or. App. 555, 558, 798 P.2d 1106 (1990). As opposed to a defamation claim's damage to reputation, a false light claim concerns a plaintiffs interest in being left alone and compensates for mental suffering due to the invasion. *Id.*

The disclosure must be public "in the sense of communication either to the public generally or to a large number of persons as distinguished from one individual or a few." *Tollefson v. Price*, 247 Or. 398, 402, 430 P.2d 990 (1967) (publication in a store and in a newspaper sufficient for the tort of false light).

Obrist has not provided evidence that more than a few people heard these remarks or others made by defendants. The evidence is vague but at most, the people include some employees in the Weatherization program and possibly some homeowners or committee members serving with defendants. This is insufficient publicity to support a false light claim. I grant summary judgment against the false light claim.

CONCLUSION

Defendants' Motion to Strike (#107) is granted in part. Defendants' Motion for Summary Judgment and Motion to Substitute County as Defendant (#56) is granted against all claims.

DATED this 17th day of January, 2003.

/s/ Garr M. King
GARR M. KING
United States District Court
Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALPHA ENERGY SAVERS, INC., an Oregon corporation; et al.,

Plaintiffs-Appellants,

v.

DIANE HANSEN; et al.,

Defendants-Appellees.

No. 03-35142

D.C. No. CV-01-01363-GMK

District of Oregon, Portland

ORDER

(Filed Sep. 14, 2004)

Before: REINHARDT, Circuit Judge.

Appellees' motion for a thirty-day extension of time within which to file a petition for rehearing or petition for rehearing en banc is GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALPHA ENERGY SAVERS, INC., an Oregon corporation; ROBERT OBRIST, Plaintiffs-Appellants, v. DIANE HANSEN; MULTNOMAH COUNTY; JUDY SWENDSEN, Defendants-Appellees.	No. 03-35142 D.C. No. CV-01-01363-GMK District of Oregon, Portland ORDER (Filed Nov. 05, 2004)

Before: REINHARDT, SILVERMAN, and CLIFTON, Circuit Judges.

The panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied.

[1] BEFORE THE EMPLOYMENT RELATIONS BOARD

STATE OF OREGON

HEARINGS DIVISION

CURTIS STEPHENS, Complainant, v. OREGON AFSCME, COUNCIL 75, JIM YOUNGER, and MULTNOMAH COUNTY OREGON, Respondents.	) Case No. UP-30-98

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing before the Administrative Law Judge commencing on the 9th day of April, 1999.

Appearances:

Appearing in behalf of the Complainant Curtis Stephens
Daniel Snyder, Attorney at Law

Appearing in behalf of the Oregon AFSCME
Kevin Keaney, Attorney at Law

[2] **April 9, 1999**

PROCEEDINGS

ROBERT L. OBRIST

called as a witness by the Complainant, having been first duly sworn, was examined and testified as follows:

THE WITNESS: Robert L. Obrist, O-b-r-i-s-t.

ALJ: Thank you, Mr. Snyder.

MR. SNYDER: Thank you.

DIRECT EXAMINATION

BY MR. SNYDER:

Q Mr. Obrist, are you associated with a local company?

A Yes, I am, Alpha Energy Savers, Inc.

Q Okay. And you're one of the owners of that company?

A Yes, I am.

Q And are you appearing today for this arbitration hearing under a subpoena issued by me?

A Yes, I am.

Q Could you explain to the Administrative Law Judge what your company does?

A Okay. Alpha Energy Savers is a weatherization company. I started in 1979. I do weatherization work, window work and, you know, mainly things like that. I'm licensed as a general contractor but specialize in weatherization of buildings.

Q Does your company provide weatherization services to [3] clients of county government?

A Yes, we do.

Q And what Oregon counties does your company do business with, Sir?

A Right now I'm working with Multnomah – well, I haven't been working much with Multnomah County recently but Multnomah County has been one; Washington County, I'm currently active with. I've done some for Yamhill County and others, but right now mainly Washington County at the moment.

Q Okay. Are you familiar with the term weatherization audit?

A Yes, I am.

Q And have you conducted weatherization audits, sir?

A Yeah. I'm a salesman basically for Alpha Energy Savers where I go out and I evaluate a house and I determine that it needs insulation and I determine that it needs ventilation and I determine the different things that I need. There's different types of audits and audit forms and so my company is currently certified to do state duct-balancing and testing under a thing that's called Premium Efficiency Ducts so – and that's a different type of an audit form too. So there's several different types of audit forms, but, yeah, I evaluate homes for a living.

Q Okay. Are you familiar with a device called a blower door?

[4] A Yes.

Q And have you used a blower door?

A Yes, my company owns two blower doors. We own a duct-buster, so yes.

Q Okay. Does your company handle weatherization work under the city of Portland, Multnomah County, Block-by-Block Program?

A Yeah, I've done both Block-by-Block in the County.

Q Okay. Do you know my client Curtis Stephens?

A Yes, I know Curtis. I met with him on jobsites. He works for Multnomah County and was one of the, I believe, inspectors and auditors and did that sort of work for the County.

Q Okay. Concerning the auditing work that Mr. Stephens did for Multnomah County is that the auditing work that you will then build upon to do the weatherization services?

A Yeah, normally the audit that Curtis or Dave or any of the people perform is in my packet. I always, you know, like to make sure it was in my packet because then we could get a feel, just like I evaluate a house what that auditor is asking us what to do. If he's saying insulate the attic, if he's saying insulate the floor, he can also tell me what the on-centers are and various things like that which helps my company immensely.

Q Did – I'm sorry, excuse me. Did Mr. Stephens' union [5] ever contact you about him?

A No, they did not.

Q If Mr. Stephens' union had contacted you about him, would you have talked to the union?

A Yes, I would.

Q As a weatherization contract – contractor, you have relied on weatherization audits conducted by Mr. Stephens under the Block-by-Block Program, is that correct?

A Yes, I have.

Q Have you had any problems with the work that Mr. Stephens did?

A No, I have not.

Q Do you know an inspector by the name of Judy Swenson?

A Yeah, I do.

Q And do you know her through her work with Multnomah County?

A Yeah, I know her basically the same way that I know Curtis and Dave Lutes and most of the other people that work at the County.

Q Insofar as Mr. Lutes and Mr. Stephens and Ms. Swenson, are these people that are friends of yours or are they mostly just business people that you know?

A Well, none of them I know. Off the record, I think I've seen Curtis at a golf tournament where we had with the Multnomah County and I think Dave, and Judy I think was [6] there. But we have things where my company helped sponsor, a golf tournament, but nothing that anything other than work-related which that is work related too, so – .

Q Okay. So you're not close personal friends of these people?

A No, I'm not.

Q Have you ever heard Ms. Swenson talk about Mr. Stephens?

A Well, you know, Judy has her way of auditing and stuff. And she's got – you know, she's got her own opinion of herself, let me put it that way. So she's very – she wants things her way, period. And she's very much – and I'm aware of that with Judy. So, yeah, she's made comments to me that, you know, that was a Curtis audit or a Dave audit and that she would need to reevaluate that audit or do something different with it.

Q Okay. Did you ever hear Ms. Swenson make comments about Mr. Stephens' audit that reflected on the quality of what he did, such as –

A Judy is – you know, she's very, very – I would say meticulous in her actions in the way of doing things, you know, where I think Dave, Curtis, myself are more – I believe I'm a human being and I make mistakes and errors and that doesn't bother me for me to make a mistake or an error. What I'm trying to do there is – is do the best job I can and I want the audit to reflect and stuff. But, yeah, [7] there's being comments made, "Well, that's a Curtis's audit or, you know, and that would need to be redone." Or she would come in and make changes to the work that – that I was supposed to, that Curtis has asked me to do according to his audit then Judy would make changes to that work and say, "No, do it this way."

Q Have you ever heard Ms. Swenson say, "This is a Curtis audit so we have to reevaluate it"?

A Well, yeah, I mean she's made that comment like I said both on Curtis' and even some of Dave's jobs. But,

again, part of that – even some of the audits that I've been given, I want to make changes. You got to understand it's not a perfect world out there. If somebody gives me a work order and says, "I want you to do this, this and this," and now I'm sending my crew out and saying, "Okay, I want you to do this, this and this," but sometimes I can accomplish this, this and this by doing things a little bit different as long as the results are the same. And what I'm saying is that Judy is not as forgiving in that way. She wants it done her way or the – basically this way or the highway. I mean it's – you know, that's – that's the way I see it.

Q Have you ever heard Ms. Swenson say concerning Mr. Stephens, "He can't do anything right"?

A Not necessarily that he can't do anything right, no, I don't think she made that comment. I would say that she's – [8] again, Judy is real particular on the way she does things and the way she wants things done. I know she believes it's best if she's the only person doing this work because I have a partner that I work with that's the same kind of person; is very meticulous in what he does and then he – you know, he believes he can do it better than anyone else in the whole world and so I'm familiar with the different types of personalities. There's A, B, and C personalities. I guess I'm a B or C, and there's people that are A's and, hopefully, the world can get along.

Q I would like you to look at – there's some exhibits in front of you.

A Okay.

Q They're numbered. If you look at exhibit 23, page 21. And I can probably –

A Twenty-three?

Q Yeah. Turn to page 21 and 23. You will see there's numbers in the lower right hand corner.

A This here says 23. And –

Q Look at page 21 of 23.

ALJ: Turn that over there –

MR. SNYDER: I can find it for him. Let me just –

THE WITNESS: This is 12 here. I'm really not sure what we're –

Q (By Mr. Snyder) Okay. Now I've showed you a document [9] which Ms. Swenson from the County called an audit report, do you see that?

A Mm-hmm.

Q Okay. Do you see when it appears here that there's a pre – pretest, it says 50 at 2156?

A Mm-hmm.

Q And then it shows a post-test of 2191.

A Mm-hmm.

Q Now what is the pre-reading, do you know?

A Yeah, the pre-reading is before any work's done at the house. You set up your blower door, you go to a CMF-15, you get a reading of the house. Now those readings can vary but you get a reading. And that, I'm assuming, is the pre-reading that this individual got at the time of 2156 by, I guess, Curtis.

Q Okay. Now, what is the post reading?

A The post reading is usually a reading that's taken after you perform the work, so you do your pre – or pre-work and then you go and perform the work and then you do a post work and, hopefully, that number is going to go down.

Q Okay. Now on this particular document that I showed you, the post reading is higher than the pre-reading, do you see that?

A Mm-hmm.

Q Does that surprise you?

[10] A No, it doesn't.

Q Why is that?

A Well, because you can have higher readings. You got to understand what blower door is and how it works and what you're doing is getting a CFM reading and you can be reading a different surface. For example, I did a job for Multnomah County that Jay Berkel (ph) was involved with but our numbers went way up after we did our pre, we did a bunch of work and then we did a post and the numbers went way up. Well, what happened was we thought we were reading the actual roofline, instead we were actually reading the – you know, the ceiling here versus the roofline, so if you're cutting in ventilation, or if you're doing some things different in the house or depending on what kind of work the numbers can actually go up. Then you would have to determine, "Okay, we must be reading a different surface now," or then you will have to have a plan of action on how you want to go back and remedy that, but the numbers can go up, yes.

Q Okay. Does it also depend on who's operating the blower door?

A Well, most people again with the blower door, my blower doors, mine are both fairly new and you have what's called a no ring test and with an A, B or C ring so you can get different numbers but – yeah, different people can get different numbers depending on the protocol which I'm [11] familiar – I sure that they had a protocol which is exactly how you set up your door and what – you know –

Q Mm-hmm.

A – what you want your house set at but, yeah, different people can get different numbers.

Q Okay. Does it also depend upon whether or not for example there are vents in the house?

A Oh, sure, if I – we've done jobs where – where we're trying to do a duct test and we want to resolve the ductwork there and you go in and do the test and then you will go look afterwards and, you know, look, hit yourself in the head and say, "Geez, this test, we need to remove all the vents," if the vents are open or if the vents are closed, or partially blocked or unblock. Yeah, I mean there's a lot of things that go into doing it and again, they're human beings usually doing it so occasionally even my men make mistakes, I make mistakes, but you know you have to have a protocol and it has to be done exactly that way and its not always going to happen that way. I know we made mistakes, yeah.

Q Is there a set time that it takes to do a weatherization audit?

A Well, depending on – if you're talking about an actual weatherization audit, I know me, as a salesman, I've been doing it for 20 years. My business was incorporated in 1979 and I go to homes that I can sell or do my type of an audit [12] and, you know, I can spend as little as 10, 15, 20 minutes there or I can spend sometimes eight hours there, you know, depending. I mean things vary, I mean nothing is always the same.

Q Okay. Do you believe that – you're familiar with what the auditors have to do under the Block-by-Block audit?

A Yeah. I did a sheet that looks similar to these and so, yeah, they go through and evaluate homes like I'm evaluating a home myself.

Q Okay. How long do you think it would take to do all of those things under the Block-by-Block audit like the blower door, pressure test, carbon monoxide, diagram the house, photograph the house, inspect the crawlspace, inspect the ceiling, give the client a weatherization discussion? I mean there's a whole laundry list of things they have to do.

A I –

MR. KEANEY: I'm going to object to this, I believe this is an improper rebuttal with this information that Mr. Snyder could have presented in his case-in-chief, it's going way beyond the scope of rebuttal at this point.

ALJ: Mr. Snyder?

MR. SNYDER: Well, we have exhibits that have been presented in the defendant's case indicating how long it takes to do an audit.

MR. KEANEY: They're admitted at the beginning of the [13] hearing.

ALJ: Well, we have a witness here who is qualified to give us an answer. I will allow the question but I understand the point that you're making.

MR. KEANEY: Well, I will also object to his qualifications, I haven't heard that he's ever worked for Multnomah County under the conditions that Multnomah County imposes on its auditors.

ALJ: That limitation is noted.

Q (By Mr. Snyder) How long does it take for all that stuff, do you have any idea?

A I would say it would vary, but I would assume somewhere between if everything went perfect, 45 minutes to two hours, three hours, maybe.

Q Just varies?

A It varies, right, I couldn't – I mean I am a salesman, I typically give myself two hours between when I make my sales calls for Alpha Energy Savers and I'm not having to do a blower door or perform stuff but I do drive around and do selling for a living, that's how I make my living and if I have a sales call, I typically will set my sales calls to 12, 2, and 4, but I normally give myself about a two hour leeway and that's not doing the blower door, so that's the time I run my business.

Q So, you're not actually – when you do these calls and [14] you're talking to people and inspecting their homes and talking about weatherization, you're not actually doing any of the diagnostic testing?

A No, in most cases my men do their own – they –

Q Okay.

A They do their diagnostic work –

Q So we would have to on top of that two-hour period layer on time to do the blower door, the carbon monoxide test, and the pressure test? Yes?

A Yeah. It would – again, I don't believe in a set time on that sort of thing but I imagine if everything went right, you could have a set time, but that's – it's possible to work under a set time and –

Q How long do you think it takes just to do a blower door test?

A My men – I asked my men because they do more than me and they basically say about 45 minutes would be a basic test.

Q Just to do a blower door?

A Forty-five minutes is typically what they would say to do a basic blower door.

Q Okay. All right. Thank you very much.

MR. SNYDER: I don't have any further questions for Mr. Obrist, Your Honor.

ALJ: Thank you.

[15] **CROSS-EXAMINATION**

BY MR. KEANEY:

Q Mr. Obrist, you're here under a subpoena, right?

A Mm-hmm.

Q But you spoke to Mr. Snyder earlier this week?

A Mm-hmm. I talked to him yesterday.

Q Okay. How long did you talk to him?

A Not very long. Maybe a half an hour, 15 minutes, a half an hour.

Q Fifteen minutes to a half an hour?

A Mm-hmm.

Q And did you talk to anyone in his office before that?

A Never met him, never knew who they were.

Q Okay. Had you talked to Mr. Stephens say in the last three, four months?

A No, I talked to – I talked to him yesterday, I called him – he had called me and then I returned his call and I talked to him for just a couple minutes and told him that I understood that there was a hearing and that I would come down and, you know, and see what I could – and do what I could.

Q Who called you first, Mr. Stephens or Mr. Snyder?

A Mr. Snyder called me first.

Q Okay. And you spent 15 or 30 minutes with Mr. Snyder and then you spent some time talking to Mr. Stephens later [16] on?

A Yeah, he had called – or he left a message for me at my work and I called back but I was on a mobile phone so I don't think I talked to Curtis very long at all, never –

nothing about – I just told him I understood there was a thing that I was suppose to go to.

Q And then later on that day, you spoke to Judy Swenson?

A No, I never spoke with Judy.

Q Never spoken to anybody in the Multnomah County offices in the last week?

A Not in the last week. I have a situation of my own going on with Multnomah County but not –

Q That's separate from this?

A That's separate from this.

Q You talked to Judy Swenson today, didn't you?

A Today, yeah, I talked to Judy today.

Q And how long did you talk to Judy Swenson today?

A She was sitting out there, I was supposed to be here at 11:30, I got here about 11:00, but I was talking with – her and Dave were in the room and we were just, you know, I was talking and they were talking. So, it would have been – we were out there about an hour, I guess.

Q Okay. And I think you started at the – you stated at the start of your testimony that you haven't been getting much work lately from Multnomah County.

[17] A Mm-hmm.

Q Is that correct?

A That's correct.

Q And it's true that you told Judy Swenson that you're upset or angry about that?

A Well, I've been – I've done a lot of work for the County in the years in the past, I don't know if you want to get into my case but I – we're working on a contract from 1996. And in 1996, Alpha did about 60 jobs for them and this is the same contract. In 1997, Alpha did about 45 jobs for them. And in 1998 to present, I've done five jobs for them. Now something is drastically wrong there, I mean if you don't see it, I sure as heck see it. And I was receiving jobs in 1996 that says now – you know, they got all these reasons to say, "You can't have a job, you're on restriction," or, "This is a special request and this job has to go to this person, it has to go to that person," but they got so much – so many reasons and stuff and they're – all I know is 1996, I got all of these jobs and even though I was on restriction, I'm getting jobs now. Today when I did get upset and finally said, "How come I'm not receiving – ." "Well, you're on restriction now." Well, in '96 it meant nothing. In '98, I was still getting jobs but now all of a sudden I guess I'm not eligible because I'm on restriction. I have a real problem about being on restriction and that's one of the [18] reasons that I've written my letter because I believe they only have a one inspector trust system and you got a person that is – I mean you got a power situation going on down there, you know, I mean I'm going to – I'm trying to – I don't have an attorney and I don't want an attorney. I just want to see some justice. I want to see just the world work together, because it ain't right now.

Q Okay. In the course of your conversation with Mr. Snyder yesterday, did he tell you, "If you help us, we will help you"?

A Well, basically, yeah, I mean when he called – I – when he called me I told him that I had a situation and I asked him if he had heard at I had a situation and he said that he had heard – you know, that I had some concerns about the County. He wouldn't tell me how he found out about it, so being that I had my situation going where I written a letter to the County, that I – if I could come down and help Curtis, and he could help me. But, again, like I told him I didn't really want to come here today, I wasn't sure if I should come here. I don't want to sue the County. Maybe – I mean maybe I should; I don't know. I mean I feel there has been some injustice done to me and I think I can make some people's lives miserable if I so choose to do that. But that's not really my desire. My desire in life is to get people to work together.

[19] Q Now, you never, in fact, observed Mr. Stephens perform any of his blower door tests?

A I have not watched Curtis do a blower door test. I did with Dave when he's doing a blower door test.

Q And do you know one of the issues at this hearing is whether he falsified several blower door tests or many blower door tests?

A No one has said that to me, the – the attorney mentioned that there was different numbers. I testified to that, and I will testify that we get different numbers, but I – I never even asked Curtis that. I'm not going to – I know he worked Washington County before. He worked at Multnomah County. So –

Q But you don't know whether he did or didn't falsify any of his blower door readings?

A I couldn't –

Q You couldn't say one way or the other?

A I couldn't tell you if he did or did not do that. I would believe he wouldn't but who knows, again, I believe most people are honest so – .

Q And you feel that Judy Swenson is meticulous in her work?

A I believe she's manipulative in her work also but I believe she is meticulous in her work. And she's also manipulative in what she – I mean that's why I believe I'm [20] not getting work. I think Curtis is having the same problems I'm having.

Q And you believe that she's real particular in her work?

A I believe she's very particular in her work.

MR. KEANEY: That's all I have, thanks.

MR. SNYDER: Can I ask just one question,

ALJ: Mm-hmm.

REDIRECT EXAMINATION

BY MR. SNYDER:

Q Earlier, Mr. Obrist, when you said that you felt there was a power situation, were you referring to Judy Swenson?

A You know, again, I'm – I'm here today, I guess with Curtis, I have my own –

Q Okay.

A But, yeah, I believe that Judy and Diane want – I guess the best way I could say it and this is honest from my heart is Judy and Diane want the program and they manipulated that program to where they want that program, it's either their way or the highway, there's no gray areas. It's either my way or the highway and I believe that's why I'm not receiving work because I'm not playing the game. Or I'm not – I mean I believe that's true, and I intend to prove that in my case. But, again, I'm not sure that I need an attorney to prove –. I just want somebody to listen to me and, you know, check the facts out.

[21] Q And when I met with you yesterday, I told you that I – the only thing I expected you do was to testify honestly.

A Mm-hmm.

Q Yes?

A Yes.

Q Thank you. Nothing further.

ALJ: Thank you very much, off the record.

DECLARATION OF TRANSCRIBER

I, Robyn M. Anderson, of Anderson Assistance, hereby certify that:

a. I am an Official Transcriber for the State of Oregon;

b. that I personally transcribed the electronic recording of the proceedings had at the time and place herein before set forth;

c. that the foregoing transcript, consisting of pages 1 through 22, represent an accurate and complete transcription of the entire record of the proceedings, as requested, to the best of my belief and ability.

WITNESS my hand at Gresham, Oregon this 24th day of July, 2002.

ANDERSON ASSISTANCE

/s/ Robyn Anderson
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OSB No. 78385

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CURTIS STEPHENS, Plaintiff, v. MULTNOMAH COUNTY, Defendant.	Case No. CV 99-855-PA **AFFIDAVIT OF ROBERT OBRIST**

STATE OF OREGON)
) ss.
County of Multnomah)

I, Robert Obrist, having been duly sworn, do hereby state as follows:

1. I am a weatherization contractor. My business is Alpha Energy Savers, Inc. located at 14548 S.E. 172nd, Clackamas, Oregon.

2. I have provided weatherization services for Multnomah County for years, both its Block by Block and county wide programs. I have worked with Curtis Stephens, Judy Swendsen and Diane Hansen and other

employees who have performed weatherization audits over the years.

3. In performing weatherization work for Multnomah County over the years, I have used the data and information that Mr. Stephens, David Lutz and other auditors compiled in their weatherization audits to perform my work. Mr. Stephens' weatherization audits and scheduling work was very acceptable. His work was as good as anyone else in the weatherization department. From time to time, every weatherization auditor I have worked with has made occasional errors. Mr. Stephens did not make more errors than any of the other weatherization auditors in his department.

4. I have observed that Ms. Swendsen and Ms. Hansen are very biased toward Mr. Stephens.

5. Both Ms. Hansen and Ms. Swendsen worked toward the goal of getting Mr. Stephens out of the weatherization department. Both Ms. Swendsen and Ms. Hansen were very manipulative. I have heard Ms. Swendsen state about Mr. Stephens, "this is a Curtis audit so we have to reevaluate it. He can't do anything right."

DATED this [Illegible] day of November 1999.

/s/ Robert Obrist
Robert Obrist

SUBSCRIBED and SWORN to before me on this 11th day of November 1999.

/s/ Misty Dawn Smith
Notary Public of Oregon
My commission expires: 9-4-2001

[SEAL] OFFICIAL SEAL
MISTY DAWN SMITH
NOTARY PUBLIC – OREGON
COMMISSION NO. 304526
MY COMMISSION EXPIRES SEP 04, 2001

Daniel Snyder
1000 S.W. Broadway
Suite 1500
Portland, Oregon 97205
Telephone (503) 241-3617
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E-mail: *dansnyder@sprintmail.com*
OSB No. 78385

Attorney for Plaintiff

I hereby certify that the following is a complete & exact copy of the original thereof.
Daniel Snyder,
Attorney for Plaintiff
/s/ Daniel Snyder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CURTIS STEPHENS,

Plaintiff,

v.

MULTNOMAH COUNTY,

Defendant.

Case No. CV 99-855-PA

PLAINTIFF'S WITNESSES STATEMENT SUMMARIES

WITNESS NO. 1: Curtis Stephens

Mr. Stephens is the plaintiff. His direct testimony is estimated to take not more than one and one-half hour. Mr. Stephens resides at 5281 N.E. 46th Place, Portland, Oregon.

Mr. Stephens is currently not employed. He was employed as a weatherization auditor by Multnomah County. He will testify about his emotional distress, his reaction to the bias and discrimination he experienced at work, and his reaction to his firing. He will talk about his economic loses after he was terminated.

He will testify about his background, experience and training. He will testify about the racial and age biased statements made to him by Diane Hansen. He will testify to his age at termination and that he was the oldest worker in the weatherization unit. He will answer the County's reasons for discharge. He will talk about his emotional distress and economic loss

WITNESS NO. 9: Robert Obrist

Mr. Obrist's direct testimony is estimated to take not more than 10 to 15 minutes. His business address is Alpha Energy Savers, Inc., 14548 S.E. 172nd, Clackamas, Oregon 97015. He is a weatherization contractor

Mr. Obrist will testify consistent with his affidavit. Mr. Obrist worked with Mr. Stephens, Ms. Hansen and Ms. Swendsen. He will testify that Mr. Stephens is a skilled auditor and that Ms. Hansen and Ms. Swendsen were biased against Mr. Stephens.

Mr. Obrist has provided weatherization services for Multnomah County for years, both its Block-by-Block and Countywide programs. He has worked with Curtis Stephens, Judy Swendsen and Diane Hansen and other employees who have performed weatherization audits over the years. In performing weatherization work for Multnomah County over the years, he has used the data and information that Mr. Stephens, David Lutz and other auditors compiled in their weatherization audits to perform his work. Mr. Stephens' weatherization audits and scheduling work was very acceptable. His work was as good as anyone else in the weatherization department. From time to time, every weatherization auditor he has worked with has made occasional errors. Mr. Stephens did

not make more errors than any of the other weatherization auditors in his department. Mr. Obrist observed that Ms. Swendsen and Ms. Hansen are very biased toward Mr. Stephens. Both Ms. Hansen and Ms. Swendsen worked toward the goal of getting Mr. Stephens out of the weatherization department. Both Ms. Swendsen and Ms. Hansen were very manipulative. Mr. Obrist has heard Ms. Swendsen state about Mr. Stephens, "this is a Curtis audit so we have to reevaluate it. He can't do anything right"

US Court of Appeals for the Ninth Circuit

Filed: 2/20/03

Court of Appeals Docket #: 03-35142

10/8/03	Received Appellants satisfaction of (minor) brief deficiency. (Gray covers) (RECORDS) [03-35142] (mhf)
11/26/03	Calendar check performed [03-35142] (rei)
2/25/04	Calendar materials being prepared. [03-35142] [03-35142] (th)
2/26/04	CALENDARED: Portland May 6 2004 9:00 a.m. Courtroom 16 [03-35142] (th)
3/17/04	FILED CERTIFIED RECORD ON APPEAL IN: 2 clerk's recors, 4 bulky docs. in expandos (one sealed). [03-35142] (jk)
5/6/04	ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Barry G. SILVERMAN, Richard R. CLIFTON [03-35142] (ms)
8/27/04	FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Stephen R. REINHARDT, author; Barry G. SILVERMAN; Richard R. CLIFTON.) FILED AND ENTERED JUDGMENT. [03-35142] (dg)
9/10/04	Filed aples' motion to extend time to file petition for rehearing until 10/10/04 served on 9/9/04 [5175130] (PANEL by fax) (dg)
9/14/04	Filed order (Stephen R. REINHARDT): granting appellee's motion to extend time to file a petition for rehearing [5175130-1] petition for rehearing due 10/12/04,,; [03-35142] (dg)

10/12/04	Filed original and 50 copies aples petition for panel rehearing and petition for rehearing en banc 15 p.pages, served on 10/7/04 PANEL/ ACTIVE JUDGES/INTERESTED SENIOR JUDGES [03-35142] (crw)
11/5/04	Filed order (Stephen R. REINHARDT, Barry G. SILVERMAN, Richard R. CLIFTON): The panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. (SEE TEXT) The petitions for rehearing and rehearing en banc are denied. [03-35142] (sf)
11/16/04	MANDATE ISSUED [03-35142] (hh)

U.S. District Court
District of Oregon (Portland)
CIVIL DOCKET FOR CASE #: 3:01-cv-01363-KI

11/18/2004	129	JUDGMENT/MANDATE of USCA for the 9th Circuit re Notice of Appeal (Appeal #03-35142) *123*. The decision of the District Court is REVERSED AND REMANDED. (Related Document(s): Notice of Appeal*123*) (Attachments: # 1) (pvh,) (Entered: 11/22/2004)
11/22/2004	130	**CIVIL MINUTES: Record of Order** – Setting a Telephone Rule 16 Conference for 12/15/2004 at 10:30AM. The court will initiate the call to the following parties: Daniel J. Snyder (503) 241-3617, Scott Erik Asphaug (503) 988-3138 and Susan M. Dunaway (503) 988-3138. Ordered by Judge Garr M. King. (mja,) (Entered: 11/22/2004)
11/23/2004	131	**CIVIL MINUTES: Record of Order** – In light of defendants' letter stating their intention to file a Petition for Writ of Certiorari, the conference scheduled for 12/15/2004 is cancelled. Defendants are asked to file a status report on 3/30/3005 [sic] or earlier if the petition is denied. Ordered by Judge Garr M. King. (mja,) (Entered: 11/23/2004)
12/13/2004		Appeal Record Returned (two original volumes, expando folders containing original documents 26, 69, 81, 105 & 107, and one expando folder containing original sealed document 3) returned from the 9th Circuit re Notice of

Appeal CA 03-35142 *123.* (Related Document(s): Notice of Appeal*123)* (tomg,) (Entered: 12/13/2004)

U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was received from pvh, entered on 11/22/2004 at 9:09 AM PST and filed on 11/18/2004

Case Name: Alpha Energy Savers, Inc. et al v. Multnomah County et al

Case Number: *3:01-cv-1363*

Filer:

Document Number: *129*

Docket Text:

JUDGMENT/MANDATE of USCA for the 9th Circuit re Notice of Appeal (Appeal #03-35142) [123]. The decision of the District Court is REVERSED AND REMANDED. (Related Document(s): Notice of Appeal[123]) (Attachments: # (1)) (pvh,)

U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was received from mja, entered on 11/22/2004 at 1:48 PM PST and filed on 11/22/2004

Case Name: Alpha Energy Savers, Inc. et al v. Multnomah County et al

Case Number: *3:01-cv-1363*

Filer:
Document Number: *130*

Docket Text:
CIVIL MINUTES: Record of Order – Setting a Telephone Rule 16 Conference for 12/15/2004 at 10:30AM. The court will initiate the call to the following parties: Daniel J. Snyder (503) 241-3617, Scott Erik Asphaug (503) 988-3138 and Susan M. Dunaway (503) 988-3138. Ordered by Judge Garr M. King. (mja,)

U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was received from mja, entered on 11/23/2004 at 10:24 AM PST and filed on 11/23/2004

Case Name: Alpha Energy Savers, Inc. et al v. Multnomah County et al
Case Number: *3:01-cv-1363*
Filer:
Document Number: *131*

Docket Text:
CIVIL MINUTES: Record of Order – In light of defendants' letter stating their intention to file a Petition for Writ of Certiorari, the conference scheduled for 12/15/2004 is cancelled. Defendants are asked to file a status report on 3/30/3005 [sic] or earlier if the petition is denied. Ordered by Judge Garr M. King. (mja,)